No. 95-1605-CFY Title: United States, Petitioner
v.
Miguel Gonzales, Orlenis Hernandez-Diaz and Mario Perez

Docketed:
April 4, 1996 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Feb 23 1996	Application (A95-704) to extend the time to file a petition for a writ of certiorari from March 6, 1996 to April 5, 1996, submitted to Justice Breyer.
	Feb 27 1996	Application (A95-704) granted by Justice Breyer extending the time to file until April 5, 1996.
	Apr 4 1996	Petition for writ of certiorari filed. (Response due May 4, 1996)
	May 15 1996	Brief of respondent Miguel Gonzales in opposition filed.
	May 15 1996	Motion of respondent Miguel Gonzales for leave to proceed in forma pauperis filed.
	May 22 1996	Brief of respondent Orlenis Hernandez-Diaz in opposition filed.
	May 22 1996	Motion of respondent Orlenis Hernandez-Diaz for leave to proceed in forma pauperis filed.
	May 29 1996	DISTRIBUTED. June 14, 1996
	Jun 6 1996	Brief of respondent Mario Perez in opposition filed.
	Jun 6 1996	Motion of respondent Mario Perez for leave to proceed in forma pauperis filed.
	Jun 7 1996	Reply brief of petitioner United States filed.
	Jun 17 1996	Motion of respondent Miguel Gonzales for leave to proceed in forma pauperis GRANTED.
	Jun 17 1996	Motion of respondent Orlenis Hernandez-Diaz for leave to proceed in forma pauperis GRANTED.
	Jun 17 1996	Motion of respondent Mario Perez for leave to proceed in forma pauperis GRANTED.
	Jun 17 1996	Petition GRANTED. SET FOR ARGUMENT December 11, 1996. **********
	Jul 31 1996	Motion of respondent Miguel Gonzales for appointment of counsel filed.
	Aug 1 1996	Brief of petitioner United States filed.
	Aug 1 1996	Joint appendix filed.
	Aug 7 1996	REDISTRIBUTED. September 30, 1996
	Aug 8 1996	Motion of respondent Orlenis Hernandez-Diaz for appointment of counsel filed.
	Aug 14 1996	REDISTRIBUTED. September 30, 1996 (Page 92)
	Aug 15 1996	Record filed.
	Aug 26 1996	Order extending time to file brief of respondent on the merits until September 20, 1996.
	Sep 20 1996	Brief of respondents Miguel Gonzales, et al. filed.
	Sep 20 1996	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Oct 7 1996	Motion for appointment of counsel GRANTED and it is ordered that Edward Bustamante, Esquire, of Albuquerque, New Mexico, is appointed to serve as counsel for the

Entry	Date	Proceedings and Orders
		respondent Miguel Gonzales in this case.
	Oct 7 1996	Motion for appointment of counsel GRANTED and it is ordered that Angela Arellanes, Esq., of Albuquerque, New Mexico, is appointed to serve as counsel for the respondent Orlenis Hernandez-Diaz in this case.
	Oct 18 1996	CIRCULATED.
	Oct 23 1996	Reply brief of petitioner United States filed.
	Oct 24 1996	Motion of respondent Mario Perez for appointment of counsel filed.
	Oct 28 1996	DISTRIBUTED. November 1, 1996 (Page 22)
	Nov 4 1996	Motion for appointment of counsel GRANTED and it is ordered that Roberto Albertorio, Esquire, of Albuquerque, New Mexico, is appointed to serve as counsel for the respondent Mario Perez in this case.
	Dec 11 1996	ARGUED.

95-1605

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c) of Title 18 requires mandatory terms of imprisonment for defendants who use or carry firearms during and in relation to certain narcotics or violent offenses, and it provides that "[n]otwithstanding any other provision of law" those prison terms "shall [not] run concurrently with any other term of imprisonment." The question presented in this case is whether a court may order that a sentence imposed under Section 924(c) is to run concurrently with a state-law sentence that the defendant is already serving.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 65 F.3d 814.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1995. The petition for rehearing was

denied on December 7, 1995. App., *infra*, 21a-22a. On February 27, 1996, Justice Breyer extended the time for filing a petition for a writ of certiorari to and including April 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 924(c)(1) (18 U.S.C.) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun or semiautomatic assault weapon to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, respondents were convicted of conspiracy to possess and distribute marijuana, in violation of 21 U.S.C. 846; possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841; and using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Respondents received sentences ranging from 120 to 147 months' imprisonment, of which 60 months reflected the mandatory sentence required by 18 U.S.C. 924(c). The court of appeals reversed respondents' convictions for possessing marijuana and vacated their sentences. App., *infra*, 1a-20a.

1. Undercover officers with the Albuquerque, New Mexico, Police Department, posing as drug dealers, arranged to sell 100 pounds of marijuana to respondents and their co-conspirator Luis Leon for $60,000. A 35-pound bale of marijuana, which was used as bait, was placed in the trunk of an undercover vehicle and shown to respondents Gonzales and Hernandez-Diaz and to Luis Leon. App., *infra*, 2a.

On the day of the sale, Leon and respondent Gonzales met with undercover officers in a parking lot adjoining Leon's apartment, where they once again viewed the bait marijuana. Leon then took one of the officers into his apartment, ostensibly to consummate the sale. Once in the apartment, however, the officer was held up at gun point by respondent Hernandez-Diaz, who apparently intended to take the

marijuana without paying for it. Respondent Perez, who was also in the apartment, helped Hernandez-Diaz by patting the officer down and taking his weapon. After the officer was disarmed, he was bound and gagged. App., *infra*, 2a-4a.

Respondent Gonzales had remained in the parking lot with a second undercover officer. While the first officer was being held up in the apartment, Gonzales pulled a gun on the second officer, took the officer's firearm, and ordered him to accompany Gonzales into the apartment. At that time, a siren sounded. Gonzales fled the area. Several officers ran up the stairs to Leon's apartment, kicked the door open, and rescued the first undercover officer. App., *infra*, 4a-5a.

2. Respondents were convicted in state court on charges arising out of the hold-up of the two undercover officers. See Gov't Pet. for Reh'g 2.[1] While they were serving those sentences, respondents and Leon were convicted in federal court of narcotics conspiracy and substantive offenses (21 U.S.C. 846, 841), and of using a firearm during and in relation to a drug trafficking crime (18 U.S.C. 924(c)). Respondents received sentences ranging from 120 to 147 months' imprisonment, of which 60 months reflected the mandatory sentence required by 18 U.S.C. 924(c).

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[1] Leon also was prosecuted for armed robbery and kidnapping by the State of New Mexico, but his trial ended in a mistrial. Although he was serving an 18-month state-law sentence for possession of a controlled substance at the time he was sentenced for the federal offenses, and although his sentence under 18 U.S.C. 924(c) was ordered to run consecutively to that state-law sentence, he did not appeal the consecutivity feature of his Section 924(c) sentence. App., *infra*, 9a-15a; see also L. Leon Presentence Investigation Report ¶ 30 (July 16, 1993).

The district court ordered so much of the new federal sentences as was attributable to the narcotics offenses to run concurrently with the state sentences. The court ordered, however, each 60-month sentence under 18 U.S.C. 924(c) to run consecutively to the state sentence that the defendant was serving.

3. The court of appeals vacated the district court's order that the sentences under Section 924(c) be served consecutively to the state sentences.[2] The court held that a sentencing court may order the five-year prison term required by Section 924(c) to run concurrently with a state-law sentence that the defendant is already serving. The court acknowledged that Section 924(c) provides that the sentence imposed under that statute shall not run concurrently "with any other term of imprisonment." App., *infra*, 12a. The court also acknowledged that "every circuit to have considered the issue has held that [Section] 924(c)'s plain language prohibits sentences imposed under that statute from running concurrently with state sentences." *Id.* at 10a. The court believed, however, that a different outcome was warranted by the canon that "courts will adopt a more sensible statutory construction" when "a literal reading of the statutory language would produce an absurd result." *Id.* at 11a.

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[2] The court of appeals also reversed respondents' substantive drug conviction and vacated their sentences. App., *infra*, 6a-9a, 20a. The court concluded that respondents could not properly be convicted of possessing the marijuana with the intent to distribute it, because the undercover officers never actually relinquished control over the drugs. *Id.* at 8a-9a. The court further set aside several enhancements imposed by the district court under the Sentencing Guidelines. *Id.* at 7a-8a, 18a-19a. We do not challenge those rulings here.

The court of appeals did not identify the specific "absurd result" that would result from applying the statutory language faithfully. App., *infra*, 11a-12a. The court's analysis focused instead on two aspects of Section 924(c) that it believed raised a doubt about whether Congress used the phrase "any other term of imprisonment" in its "most literal[]" sense. App., *infra*, 12a. First, the court cited the fact that Section 924(c) is a "federal statute, with presumed concern for the treatment of federal crimes." *Ibid.* Second, the court found it significant that Congress used a "roundabout locution" to "negate[] the imposition of a concurrent sentence, rather than to employ more conventional and declaratory language to require [a] consecutive sentence[]." *Id.* at 12a-13a.

Because the court believed that those two features of the statute created an ambiguity about what Congress intended, it examined the Senate Report that accompanied the 1984 amendments to Section 924(c), which added the provision forbidding a concurrent sentence and made other changes. App., *infra*, 13a-14a. That report reflected, among other things, the Committee's "inten[tion] that the mandatory sentence [under Section 924(c)] be served prior to the start of the sentence for the underlying or any other offense." S. Rep. No. 225, 98th Cong., 1st Sess. 313-314 (1983). The court concluded that, in order to give effect to that intent, the phrase "any other term of imprisonment" must be interpreted to exclude a state sentence that the defendant is already serving. The court explained that "if a defendant is sentenced in state court first, there is no way in which a later-sentencing federal court can cause the mandatory five-year [Section] 924(c) sentence to be served before a state sentence that is already being served," App., *infra*, 16a. The resulting federal sentence would become, in the court's view, "anomal[ously]" harsh. *Id.* at 15a. The court also found its conclusion "entirely consistent" with Sentencing Guidelines § 5G1.3, which generally provides for a concurrent sentence when a defendant has previously been prosecuted in state court for the events that gave rise to his federal conviction. App., *infra*, 16a-17a.

REASONS FOR GRANTING THE PETITION

The court of appeals concluded that the requirement in 18 U.S.C. 924(c) that a sentence under that statute run consecutively to "any other term of imprisonment" should not be read "literally," but must instead be interpreted to exclude a state prison sentence. That conclusion not only conflicts with the decision of every court of appeals that has considered the question, but it also resulted from a mode of statutory analysis that finds no support in the controlling decisions of this Court. Because 18 U.S.C. 924(c) is an important and widely used statute, the court of appeals' error calls for correction by this Court.

1. As the court of appeals conceded (App., *infra*, 10a), its conclusion is at odds with published decisions of the Eleventh and Sixth Circuits, see *United States* v. *McLymont*, 45 F.3d 400, 401-402 (11th Cir), cert. denied, 115 S. Ct. 1723 (1995); *United States* v. *Ospina*, 18 F.3d 1332, 1335-1336 (6th Cir.), cert. denied, 114 S. Ct. 2721 (1994), and with the unpublished decisions of several other circuits, App., *infra*, 10a (citing cases). The Seventh Circuit, in a recent published opinion, has expressly refused to follow the Tenth Circuit's lead, agreeing instead with the analysis of the Eleventh and Sixth Circuits. See *United States* v. *Thomas*, No. 95-1788 (7th Cir. Feb. 28, 1996), slip op. 2-

7. Because the Tenth Circuit declined to reconsider its conclusion en banc, App., *infra*, 22a, only this Court's intervention can correct the Tenth Circuit's error and restore uniformity to this important area of federal law.

2. The court of appeals' decision not only disregards the plain language of Section 924(c), but it also improperly elevates an isolated remark in a Committee Report over the language actually enacted by Congress. That decision therefore is unsupportable under any mode of statutory analysis heretofore endorsed by this Court.

a. In construing Section 924(c), this Court has consistently emphasized that words not defined in the statute should be construed "in accord with [their] ordinary or natural meaning." *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993); see also *Deal* v. *United States*, 113 S.Ct. 1993, 1997-1999 (1993); *Bailey* v. *United States*, 116 S.Ct. 501, 506 (1995).[3]

[3] Respondents did not challenge their Section 924(c) convictions in the court of appeals. App., *infra*, 9a. Nor is the sufficiency of the evidence to support those convictions affected by this Court's recent decision in *Bailey* v. *United States*, *supra*, since there is no question that respondents "actively" used firearms during and in relation to the narcotics conspiracy. While we recognize that the jury instructions defining the term "use" did not embody the "active employment" definition adopted in *Bailey* (see 6/18/93 Jury Instruction No. 8I), respondents did not challenge the instructions at trial, and this is not a case in which such a challenge would afford relief if raised for the first time on appeal. That is because a rational jury that found respondents guilty necessarily found an "active" use, since all of the evidence surrounding the firearms involved active uses. In any event, whether the instructions would support relief under the stringent plain error standard (see *United States* v. *Olano*, 113 S. Ct. 1770 (1993)), is an issue that would be open on remand if this Court were to grant review and correct the court of appeals' erroneous construction of Section 924(c)'s sentencing provisions.

That principle governs this case. Section 924(c) provides that a sentence imposed thereunder "shall [not] * * * run concurrently with any other term of imprisonment including that imposed for the * * * drug trafficking crime in which the firearm was used or carried." Nothing in that broad proscription forbids a concurrent sentence only when the defendant is already serving a *federal* term of imprisonment. To the contrary, by using the inclusive word "any," Section 924(c) manifests an intent to reach all "other terms[s] of imprisonment" that a defendant convicted under that statute might be serving. Compare *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1604 (1994) (statute that refers to an arrest made by "any law enforcement officer" includes "federal, state, or local" officers).

The court of appeals' view that the phrase "any other term of imprisonment" should be read as if it stated "any other *federal* term of imprisonment" is belied by the first clause of Section 924(c). That clause also uses the inclusive word "any"; it does so to refer to the predicate narcotics and violent crimes that trigger application of Section 924(c). That clause, however, makes clear that the statute does not reach using or carrying a firearm during a state-law violation by providing that a narcotics or violent crime qualifies as a predicate offense only if the defendant "may be prosecuted [for it] in a court of the United States"—*i.e.*, only if it is a federal crime. The fact that Congress expressly limited the broad sweep of the word "any" in the first clause of Section 924(c)

is a telling indication that it did not intend the same limitation with respect to the prohibition on concurrent sentences. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Indeed, as the Seventh Circuit recently noted, other subsections of Section 924 demonstrate that Congress is "perfectly capable * * * of specifying that a provision relates to state or federal matters." *United States* v. *Thomas*, slip op. 4 (citing 18 U.S.C. 924(g)).

There is no greater force to the court of appeals' view that Congress created an ambiguity by using a "roundabout locution" (App., *infra*, 12a) to forbid a concurrent sentence, instead of affirmatively requiring a consecutive one. Under federal law, a district court usually has discretion to provide for a concurrent or consecutive sentence, and the two are mutually exclusive options. See 18 U.S.C. 3584(a).[4]

[4] The authority conferred by 18 U.S.C. 3584 is bounded by the provisions of 18 U.S.C. 3585, which governs when a new federal sentence may be deemed to "commence" and which defines the circumstances under which the defendant may receive credit for any time he has spent in official detention before the sentence commenced. See generally *United States* v. *Wilson*, 503 U.S. 329 (1992). Because of that statute, it has long been the rule that a federal sentence cannot begin to run before the date of imposition, and thus that a federal sentence can be made concurrent only with *the remainder* of any sentence that the defendant may already be serving. See, *e.g.*, *Shelvy* v. *Whitfield*, 718 F.2d 441, 444 (D.C. Cir. 1983) (per Ginsburg & Scalia, JJ.) (interpreting predecessor of 18 U.S.C. 3585); *United States* v. *Flores*, 616 F.2d 840, 841 (5th Cir. 1980).

Forbidding a concurrent sentence accordingly is equivalent to affirmatively requiring a consecutive one. Because Congress was aware that district courts could use their statutory discretion under Section 3584(a) to make a new federal sentence concurrent with a federal or a state sentence that the defendant was already serving, see S. Rep. No. 225, *supra*, at 129, Section 924(c)'s language is best understood as foreclosing the exercise of that statutory authority in Section 924(c) cases—a point that is driven home by the clause that introduces the prohibition of a concurrent sentence (*i.e.*, "[n]othwithstanding any other provision of law"). For that reason, Sentencing Guidelines § 5G1.3 (1993) lends no support to the court of appeals' analysis; that provision simply implements the authority that a district court enjoys under 18 U.S.C. 3584(a). See Guidelines § 5G1.3, Background. Indeed, the Sentencing Guidelines expressly recognize that Section 924(c) mandates a sentence that must "run consecutively to any other term of imprisonment." Guideines § 2K2.4, Application Note 1; see also *United States* v. *Thomas*, slip op. 4-5 n.2; *United States* v. *McLymont*, 45 F.3d at 402.

Finally, the result produced by the plain language of Section 924(c) cannot fairly be labeled "absurd" (App., *infra*, 11a) solely because the court of appeals did not believe that Congress could have intended drastically to increase the "custodial price" (*id.* at 15a) of Section 924(c) offenses. Even if the court were correct in its calculation of the total number of years that respondents will be required to serve in prison, that type of "ungarnished policy view" has been previously rejected by this Court as a guide for interpreting Section 924(c), see *Deal* v. *United States*, 113

S. Ct. at 1998 & n.3, and the Tenth Circuit offered no reason why it should fare any better here. Indeed, it is hardly "difficult to fathom" that Congress "could rationally have decided that the use or carrying of a firearm during or in relation to a crime of violence [or drug trafficking crime] warranted a minimum term of imprisonment in addition to any other term of imprisonment imposed on the defendant." *United States* v. *Thomas*, slip op. 6.

b. Because there is no ambiguity in the statutory language, the Tenth Circuit erred in refusing to apply Section 924(c) as written and resorting to legislative history. See, *e.g. Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). The court compounded that error by relying on the Committee Report's statement concerning the order in which Section 924(c) sentences should be served. That statement does not purport to explain any language in the statute, and for that reason it is a particularly unlikely source of authority for disregarding what Section 924(c) actually says. As this Court recently noted, "[m]embers of this Court have expressed differing views regarding the role that legislative history should play in statutory interpretation," but the Court has never "given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute." *Shannon* v. *United States*, 114 S. Ct. 2419, 2426 (1994).[5]

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[5] Not only is the Committee's statement on which the Tenth Circuit relied not embodied in Section 924(c), but it is also inconsistent with another provision of the Sentencing Reform Act of 1984, which was part of the same bill as the 1984 amendments to Section 924(c). Section 3584(c) of Title 18 makes clear that a district court that imposes sentence on multiple counts does not designate which of those sentences must be served first, because "[m]ultiple terms of imprisonment ordered to run concurrently or consecutively shall be treated for administrative purposes as a single, aggregate term of imprisonment."

Moreover, the legislative history that actually speaks to the meaning of the provision at issue here contradicts, rather that supports, the Tenth Circuit's conclusion. In explaining the effect of the prohibition on concurrent sentences the Committee Report stated:

> The Committee has concluded that subsection 924(c) should be completely revised to ensure that all persons who commit Federal crimes of violence * * * receive a mandatory sentence, without the possibility of the sentence being made to run concurrently with that for the underlying offense *or for any other crime* and without the possibility of a probationary sentence or parole.

S. Rep. No. 225, *supra*, at 313 (emphasis added). In our view, the Senate Committee's understanding that the 1984 amendments to Section 924(c) would preclude a sentence concurrent with a defendant's sentence "for any other crime" strongly confirms the unqualified language used in the statute itself, and is more pertinent than the language from the same Report on which the Tenth Circuit relied.

Indeed, if the Senate Report's statement concerning the order in which sentences should be served is given the weight the court of appeals assigned to it, it would severely restrict the statutory language in a manner that could not possibly have been intended by Congress. The Tenth Circuit reasoned that a sentence under Section 924(c) cannot be served before a state sentence that the defendant is already serving.

App., *infra*, 16a. The same would be true, however, of any *federal* sentence that the defendant may already be serving, because the new federal sentence for the Section 924(c) offense cannot commence before the date it is imposed, see 18 U.S.C. 3585(a); Federal Bureau of Prisons, *Sentence Computation Manual CCCA*, Program Statement 5880.28, at 1-13 (1992 & Supp. 1994), and therefore cannot be served before a federal sentence that is already in progress. If the statement cited by the Tenth Circuit is to be given the force of law, therefore, the result will be that Section 924(c) sentences can run consecutively only to sentences that are imposed at the same time when the defendant is sentenced for the Section 924(c) offense. That result would turn Congress' effort to write an expansive statute on its head.

3. The Tenth Circuit's error warrants correction by this Court. Because it is not uncommon for defendants who are prosecuted in federal court to be subject to undischarged state sentences, the erroneous decision of the Tenth Circuit will lead to unwarranted disparities in the sentences meted out to similarly situated defendants depending solely on geographic happenstance. There is no reason to tolerate that disparate application of an important and widely used criminal statute.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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APRIL 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 93-2292, 93-2293, 93-2294 and 93-2295

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MIGUEL GONZALES, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ORLENIS HERNANDEZ-DIAZ, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LUIS LEON, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARIO PEREZ, DEFENDANT-APPELLANT

Aug. 30, 1995

Before: HENRY and McKAY, Circuit Judges, and SHADUR,* Senior District Judge.

McKAY, Circuit Judge.

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* Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

STATEMENT OF THE FACTS

This case began as a "reverse sting" operation by the Albuquerque Police Department. In a reverse sting, police officers assume the role of drug dealers in order to infiltrate drug rings. On April 22, 1991, Officer James Torres of the Albuquerque Police Department met a confidential informant and Appellant Leon at the Kettle Restaurant in Albuquerque. (Tr. at 20-21) The purpose of the meeting was to arrange the sale of 100 pounds of marijuana to Mr. Leon and his "money people" for eventual distribution in Miami, Florida. (Tr. at 22) Mr. Leon did not identify his "money people" to Officer Torres during their initial meeting, but did say they were coming to Albuquerque via Dallas, Texas. (Tr. at 24) Later that same day, Appellant Leon contacted Officer Torres and said his "people" had arrived and wanted to see a sample of the marijuana. (Tr. at 25) At approximately 6:30 p.m. on April 22, Officer Torres met Luis Leon at a Circle K in Albuquerque and was introduced to two of Mr. Leon's co-conspirators, Miguel Gonzales and Orlenis Hernandez-Diaz. (Tr. at 26) Detective Gloria later joined Officer Torres and the three appellants at the Circle K and showed the appellants a 35-pound bale of marijuana that was in the trunk of his undercover vehicle. (Tr. at 29) After examining the marijuana, the appellants agreed to buy 100 pounds of marijuana for $60,000. The transaction was to occur the next day at 9:00 a.m. (Tr. at 3, 33)

At approximately 9:30 a.m. the next morning, Officer Torres met Mr. Leon and Mr. Gonzales at the Circle K. Mr. Leon asked whether Officer Torres had the marijuana with him, and Officer Torres replied

that he did not because he wanted to see the money first. (Tr. at 34) Mr. Leon took Officer Torres to his apartment to view the purchase money. (Tr. at 34-35) When he entered the apartment, Officer Torres met co-conspirator Mr. Perez. Messrs. Perez, Hernandez-Diaz, and Leon were all in the apartment at that time. (Tr. at 35) The three dealers wanted to see the marijuana again before handing over the $60,000, so Officer Torres took Mr. Leon back to the Circle K so he could again view the drugs. (Tr. at 36) Officer Torres telephoned Detective Gloria and instructed him to bring the marijuana to the Circle K. Upon reaching the store, Appellant Leon once more examined the drugs, then took Officer Torres back to his apartment to complete the transaction. (Tr. at 36) On the way back to the apartment, Mr. Leon told Officer Torres to circle the area to make sure there were no police cars in the vicinity. The officer did as he was instructed and passed two marked patrol cars on the way. Mr. Leon became concerned and asked Officer Torres if he were a police officer. Officer Torres replied that he was not and that he just wanted to complete the deal.

After finishing the circle, Officer Torres pulled into the parking lot below Appellant Leon's apartment and instructed Detective Gloria to park his vehicle east of a Ford Bronco into which the marijuana would be loaded. (Tr. at 37) Once in the parking lot, Appellants Gonzales and Leon again said they wanted to see the marijuana, so all four of them—Officer Torres, Detective Gloria, Appellant Gonzales, and Appellant Leon—went to the back of the undercover vehicle to view the 100 pounds of marijuana. (Tr. at 39) Then, Appellant Leon and Officer Torres went upstairs to Mr. Leon's apartment to count the money.

Once inside the apartment, Mr. Hernandez-Diaz pulled a gun on Officer Torres. Officer Torres raised his hands and pleaded with Mr. Hernandez-Diaz to spare his life. Mr. Leon, who was standing next to Officer Torres, also raised his hands and asked what was going on. Mr. Hernandez-Diaz then relieved Mr. Leon of his weapon, a handgun which was concealed in his waistband. Officer Torres was taken hostage at gunpoint by Mr. Hernandez-Diaz, who apparently intended to steal the marijuana without paying for it. Mr. Hernandez-Diaz placed a cushion against the officer's body and placed the gun against it, telling him to be quiet or he would be killed. While Mr. Hernandez-Diaz held the officer at gunpoint, Appellant Perez patted him down and took his handgun. (Tr. at 53) Officer Torres was then taken into an adjacent bedroom and his hands and feet were taped together and his mouth was taped shut.

It was at this point that the other officers came running up the stairs, kicked in the door, and arrested Appellants Hernandez and Leon. (Tr. at 52) Appellant Perez fled, but was later captured.

As Officer Torres was being held at gunpoint upstairs, Detective Gloria likewise was being held at gunpoint by Appellant Gonzales downstairs. (Tr. at 321) After seeing Officer Torres and Mr. Leon go to the apartment, Mr. Gonzales tapped on the window of Detective Gloria's car and asked to see the marijuana again. Once the trunk was open, Mr. Gonzales pulled out a handgun and pointed it at Detective Gloria, ordering him to go upstairs. (Tr. at 321) Detective Gloria ignored the orders and tried to slam the trunk shut. (Tr. at 321) He then raised his hands in the air, enabling Mr. Gonzales to see the gun in his holster. As Mr. Gonzales reached forward and took the gun, a

siren went off. Mr. Gonzales immediately fled the area. (Tr. at 322) Detective Gloria then joined the other officers who were running upstairs to rescue Officer Torres.

STATEMENT OF THE CASE

The defendants were all convicted of conspiracy to possess and distribute marijuana, 21 U.S.C. § 846 and 18 U.S.C. § 2; possession with intent to distribute marijuana, 21 U.S.C. §§ 841(a)(1) and (b)(1)(D); and the use or carrying of a firearm during a drug trafficking crime, 18 U.S.C. § 924(c)(1). They received sentences ranging from 120 to 147 months. In addition, the defendants had previously received substantial state sentences for convictions arising out of the same conduct. The defendants, aside from Mr. Perez, have not directly challenged their conspiracy or firearm convictions, but all have appealed their convictions for possession. They also each raise several other issues. Because common issues predominated, the appeals of Messrs. Gonzales, Hernandez-Diaz, and Perez were consolidated on appeal. Because Mr. Leon's appeal also raises common issues, we have addressed his appeal together with those of his co-conspirators in this opinion. We will first address the common issues and then turn to the individual issues.[1]

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[1] As a threshold matter, the government suggests that we do not have jurisdiction over the appeal of one of the defendants, Mr. Gonzales, because he did not file his appeal in a timely fashion. Upon receipt of the admittedly late appeal, we remanded to the district court for a determination of whether counsel or Mr. Gonzales could demonstrate excusable neglect for his failure. The district court found excusable neglect and granted appellant's retroactive Rule 4(b) Motion for Extension

DISCUSSION

All of the defendants were given three level increases in their sentences pursuant to U.S.S.G. § 3a1.2(b). This sentence enhancement applies when, "during the course of the offense . . . the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement . . . officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury." *Id.* § 3a1.2(b). The appellants concede that they assaulted an officer so as to create a substantial risk of serious bodily injury. Nevertheless, the appellants claim that the application of this enhancement was in error because they did not know or have reasonable cause to believe that the person(s) assaulted were police officers.

The government points to several facts which it contends demonstrate that the appellants reasonably should have known that they were dealing with police officers: first, the fact that Officer Torres and Detective Gloria were carrying guns; second, the presence of marked police cars in the vicinity; and, third, the fact that the appellants themselves expressed suspicions that Officer Torres was a cop. Taken together,

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of Time to file his appeal. We cannot say that this was an abuse of discretion because there was a genuine issue about the correctness of the original judgment, which was later amended. While the amendment to the original judgment was technical in nature and perhaps did not qualify as a new judgment for purposes of the date for filing an appeal, the confusion surrounding the issue was at least substantial enough to create excusable neglect. Thus, we do have jurisdiction over Mr. Gonzales' appeal as well as those of his co-defendants.

we conclude that these facts are insufficient to support the application of this enhancement.

The fact that Officer Torres and Detective Gloria carried weapons would not provide a basis for the reasonable drug dealer to believe that he was dealing with police officers. We have frequently noted in other contexts that firearms are a practically ubiquitous accoutrement of those in the drug trafficking trade. Indeed, each of the drug dealers in this case carried a firearm; there were no unarmed persons at the scene. Thus, the fact that the officers were armed does not in any way label them as police officers.

Similarly, the presence of police cars in the neighborhood did not provide a reasonable basis for the defendants to conclude that they were dealing with police officers. Police cars are a common sight on city streets everywhere, particularly in areas of high crime. There was absolutely nothing in particular that would cause the appellants to link Officer Torres and Detective Gloria with the marked police cars.

Finally, the government makes much of the fact that the appellants voiced suspicions about whether Officer Torres might be a police officer and in fact asked him repeatedly if he were. What the government ignores is that Officer Torres successfully allayed their suspicions and convinced the appellants that he was a legitimate criminal. Furthermore, it is only natural for those engaged in highly illegal activities to be concerned about whether they are involved in a sting. Thus, mere suspicion based on speculation alone does not equate to "reasonable cause to believe." See *United States v. Castillo*, 924 F.2d 1227, 1236 (2d Cir.1991). The success of the sting operation in this case itself demonstrates that the

appellants were convinced that Officer Torres and Detective Gloria were criminals, not cops.

The appellants also challenge the sufficiency of the evidence supporting their convictions for possession of marijuana with intent to distribute. In order to convict a defendant of 21 U.S.C. § 841(a), the government must prove the following elements beyond a reasonable doubt: (1) the defendant knowingly possessed the illegal drug, and (2) the defendant possessed the drug with the specific intent to distribute it. *United States v. Gay*, 774 F.2d 368, 372 (10th Cir.1985). We must sustain the conviction if the evidence, "taken in the light most favorable to the government," would allow a fact finder to find guilt beyond a reasonable doubt. *Id.* There is no question that the appellants had the intent to distribute drugs; however, the appellants deny that they ever possessed the drugs in question.

The government concedes that the defendants did not actually possess the drugs in this case, but contends that the test for constructive possession has been satisfied. It is not disputed that possession of drugs may be either actual or constructive and that constructive possession may be established by circumstantial evidence if the government shows a sufficient nexus between the defendant and the drugs. *United States v. Culpepper*, 834 F.2d 879, 881-82 (10th Cir.1987). Generally, a person has constructive possession of narcotics if she or he knowingly has ownership, dominion, or control over the drugs or the premises where they are found. *United States v. Parrish*, 925 F.2d 1293, 1296 (10th Cir.1991).

The government theorizes that Mr. Gonzales exercised dominion and control over the drugs when he pulled the gun on Detective Gloria because he

"could have taken the car keys and driven away, killed or wounded Officer Gloria and taken the marijuana or simply have picked up the marijuana and walked away." Aple's Brief at 31. However, the fact remains that none of these possibilities occurred. Mr. Gonzales never exercised dominion and control over the marijuana because he never had the keys and because Detective Gloria, by attempting to slam the trunk, made it clear that he was not relinquishing possession of the drugs.[2] Nor did Mr. Gonzales exercise dominion and control of the premises where the drugs were found: the parking lot was under surveillance by undercover officers, the area was not secured, and Mr. Gonzales had no power to exclude anyone from the area.

We conclude that there was insufficient evidence for a reasonable jury to conclude that Mr. Gonzales had constructive possession of the drugs. His conviction on this count must be reversed. Because the other defendants were convicted for aiding and abetting Mr. Gonzales, their convictions for this crime must also be overturned.

All of the appellants received five-year sentences for using a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). While the appellants do not dispute the sufficiency of the conviction, three of the appellants (Messrs. Gonzales, Perez, and Hernandez-Diaz) claim that the district court erred in ruling that they are to serve their sentence for this crime consecutive to the completion of their state sentences arising out of the same conduct. The question we must answer is whether § 924(c)'s manda-

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[2] We note, moreover, that Mr. Gonzales fled immediately after Detective Gloria slammed the trunk.

tory five-year sentence may run concurrently with a previously imposed *state* sentence that a defendant *has already begun to serve*. We hold that it can.

At sentencing, the district court ruled that each defendant's sentence for the underlying substantive federal offenses should run concurrently with the sentence previously imposed by the state court for the identical offenses. The district court then ordered that the five-year term imposed under § 924(c) should run consecutively to both the federal and the state charges, obviously reading § 924(c) as barring the imposition of a sentence concurrent with any prior state sentence. In so ruling, the district court joined good company—every circuit to have considered the issue has held that § 924(c)'s plain language prohibits sentences imposed under that statute from running concurrently with state sentences, although most of these opinions have not been published. *See, e.g., United States v. McLymont*, 45 F.3d 400, 401-02 (11th Cir.), cert. denied, — U.S. ——, 115 S.Ct. 1723, 131 L.Ed.2d 581 (1995); *United States v. Gibson*, 23 F.3d 403 (table), 1994 WL 191609, at *2 (4th Cir.1994); *United States v. Ospina*, 18 F.3d 1332, 1335-36 (6th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 2721, 129 L.Ed.2d 846 (1994); *United States v. Hoard*, 12 F.3d 1101 (table) 1993 WL 473690, at *8- 9 (7th Cir.1993); *United States v. Maillett*, 967 F.2d 594 (table), 1992 WL 144713, at *1 (9th Cir.1992).

In general, the choice between imposing concurrent and consecutive prison terms is left to the sound discretion of the sentencing court. *See United States v. Kalady*, 941 F.2d 1090, 1097-98 (10th Cir.1991). Hence, we ordinarily review such sentences for an abuse of discretion. *See id.* But where, as here, a district court's leeway is cabined by statute, we

review that court's construction of the statute de novo. *United States v. Hall*, 20 F.3d 1084, 1088 (10th Cir.1994). We also review de novo a district court's reading of the Sentencing Guidelines. *United States v. Gacnik*, 50 F.3d 848, 852 (10th Cir.1995).

In interpreting a statute, we begin with the language of the statute itself. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S.Ct. 1570, 1575, 108 L.Ed.2d 842 (1990). However, where a literal reading of the statutory language would produce an absurd result—particularly one clearly not contemplated by Congress—courts will adopt a more sensible statutory construction. This principle was announced more than a century ago in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892), and is still alive and well today:

> Where the literal reading of a statutory term would "compel an odd result," we must search for other evidence of congressional intent to lend the term its proper scope. . . . Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention.

Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 454-55, 109 S.Ct. 2558, 2567, 105 L.Ed.2d 377 (1989) (citations omitted); *accord In re Invest-ment Bankers, Inc.*, 4 F.3d 1556, 1564 (10th Cir.1993), *cert. denied*, — U.S. ——, 114 S.Ct. 1061, 127 L.Ed.2d 381 (1994). As the ensuing discussion reflects, this concept controls the application of § 924(c) to these defendants, requiring us to go beyond the literal language of the code section and " 'venture into the

thicket of legislative history.'" *Unruh v. Rushville State Bank*, 987 F.2d 1506, 1508 (10th Cir. 1993) (citation omitted).

The following language of § 924(c)(1) was in effect at the time of the relevant offenses:

> Whoever, during and in relation to any . . . drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime . . ., be sentenced to imprisonment for five years. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, *nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.*

18 U.S.C. § 924(c)(1) (1988) (emphasis added). There are two plausible ways in which the phrase "any other term of imprisonment" could be read. Taken most literally, "any other term of imprisonment" would encompass not only all federal sentences but state sentences as well. However, since this is a federal statute, with presumed concern for the treatment of federal crimes, the language could be read more narrowly to apply only to federal sentences, excluding state sentences from its scope. The principal clue to the proper choice between these alternatives follows from this question: Why did Congress choose to use the statute's roundabout locution, which negates the imposition of a concurrent sentence, rather than to

employ more conventional and straightforward declaratory language to require consecutive sentences? For example, Congress might have said:

> Any term of imprisonment imposed under this subsection shall run consecutively to any other term of imprisonment including that imposed for the crime in which the firearm was used or carried.[3]

The answer to this question may be found in Congress' statement of its intention in enacting the 1984 amendment to § 924(c) (the version we are concerned with here). The Senate Report that accompanied the 1984 amendment to § 924(c) reads:

> In either case, the defendant could not be given a suspended or probationary sentence, nor could any sentence under the revised subsection be made to run concurrently with that for the predicate crime or with that for any other offense. *In addition, the Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense.*

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[3] When Congress intended to require that one prison term follow another sentence, it knew how to say so. See, e.g., 18 U.S.C. § 3146(b)(2) (1988) ("A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense."). Congress' omission of a similarly straightforward directive in § 924(c) thus appears to be a deliberate choice rather than a mere oversight. Compare *Custis v. United States*, — U.S. ——, ——, 114 S.Ct. 1732, 1736, 128 L.Ed.2d 517 (1994).

S.Rep. No. 225, 98th Cong., 2d Sess. 313-14, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 (emphasis added).[4]

Both Courts of Appeals that have been aware of this stated congressional purpose have honored it. *Jackson v. United States*, 976 F.2d 679, 682 (11th Cir.1992) (per curiam); *Rodger v. White*, 907 F.2d 151 (table), 1990 WL 95624, at *4 (6th Cir.1990). One of our own district courts has also acknowledged this legislative intention. *Johnson v. Matthews*, 751 F.Supp. 190, 192 (D.Kan.1990). Although several of our own earlier opinions referred in dicta to § 924(c) sentences as being served "consecutively to" (that is, after) other substantive-offense sentences, these opinions were apparently issued without an awareness of the express congressional intent that we have, of necessity, discovered in this case. *See, e.g., United States v. Moore*, 958 F.2d 310, 312 (10th Cir.1992); *United States v. Lanzi*, 933 F.2d 824, 826 (10th Cir.1991); *Chalan*, 812 F.2d at 1315.[5] Furthermore,

[4] Committee reports accompanying ultimately enacted bills are a favored authoritative source of legislative history. *Thornburg v. Gingles*, 478 U.S. 30, 43 n. 7, 106 S.Ct. 2752, 2762 n. 7, 92 L.Ed.2d 25 (1986). While we have, on more than one occasion, cited this Senate Report in addressing the interpretation of § 924(c), *see, e.g., United States v. Overstreet*, 40 F.3d 1090, 1094-95 (10th Cir.1994), cert. denied, — U.S. ——, 115 S.Ct. 1970, 131 L.Ed.2d 859 (1995); *United States v. Chalan*, 812 F.2d 1302, 1315-16 (10th Cir.1987), we have not previously visited this particular passage.

[5] This unawareness also apparently extended to the Sentencing Commission. Application Note 1 to § 2k2.4 refers to § 924(c) as calling for a term that runs "consecutively to any other term of imprisonment." U.S.S.G. § 2k2.4 Note 1. The First Circuit has also interpreted § 924(c) in this manner, but did so without any claimed support other than a citation to

none of these opinions dealt with the anomaly that follows from combining the incorrect "consecutive to" approach with an all-inclusive reading of "any other term of imprisonment."

The result for these defendants of such a combined reading, under which the five-year sentence on the § 924(c) gun count would have to follow a previously imposed state sentence and would have to precede a corresponding federal sentence, would be:

Sentences in Years:	State	§ 924(c)	Federal	Total
Hernandez-Diaz:	14.5	5	5	24.5
Gonzales:	13	5	5	23
Perez:	17	5	7.25	29.25

In each instance this approach would more than double the custodial price that Congress and the Guidelines have set for committing the total criminal conduct engaged in by these defendants.

The adoption of a reading that § 924(c)'s prohibition against concurrent sentences refers only to federal sentences does not at all depreciate the severity of the crimes involved. Under such a reading, in which the gun-charge sentence would begin immediately upon the district court's imposition of sentence (thus running concurrently with the pre-existing state sentence), and would be followed immediately by the other federal sentences for any other substantive offenses, every defendant would be required to serve *at least* the combined term for the gun offense and the underlying federal offense. Where, as here, a state sovereign has previously viewed the same criminal conduct more seriously than Congress and the

§ 924(c) itself. *United States v. McFadden*, 13 F.3d 463, 464 (1st Cir.1994).

Sentencing Commission have decreed, the defendant would therefore have to remain in prison until the longer state sentence had expired. Mr. Hernandez-Diaz, for example, would have to serve out any remaining portion of his fourteen-and-one-half-year state sentence at the end of the custodial portion of his aggregate ten-year federal sentence.

Our conclusion that the phrase "any other offense" encompasses only federal offenses is required if we are to follow Congress' stated intent that § 924(c) sentences be served prior to "any other offense," for if a defendant is sentenced in state court first, there is no way in which a later-sentencing federal court can cause the mandatory five-year § 924(c) sentence to be served before a state sentence that is already being served. Our interpretation is also entirely consistent with the Guidelines. Guideline § 5G1.3(b), which is applicable where, as here, a defendant is prosecuted in both federal and state court for the same conduct, states:

> If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

"'The intended purpose of § 5G1.3(b) is to effec-tively "credit[ ] for guidelines purposes" defendants who have already served time—generally in another jurisdiction—for the same conduct or course of conduct.'" *United States v. Johnson*, 40 F.3d 1079, 1082 (10th Cir.1994) (*quoting United States v. Flowers*, 13 F.3d 395, 397 (11th Cir.1994)). If the

all-encompassing reading of § 924(c) were adopted so that the gun-charge sentence would have to follow the service of the entire pre-existing state sentence and precede the federal sentence covering the identical conduct, § 5G1.3's concurrent sentencing scheme would be rendered nugatory. We decline to endorse such a contradictory interpretation.

Appellants Gonzales, Perez, and Hernandez-Diaz also contend that the district court erred by refusing to award pre-sentence credit to them for time that they spent in federal custody prior to sentencing. Their claim is based on 18 U.S.C. § 3585(b), which states:

> A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . as a result of the offense for which the sentence was imposed . . . that has not been credited against another sentence.

18 U.S.C. § 3585(b) (1988). The government does not dispute that § 3585(b) is applicable and that the appellants may be entitled to credit for the time in question, but instead argues that we need not reach that issue. We agree. The proper inquiry is whether the district court had the authority to award the credit sought at all. The United States Supreme Court has made it clear that it did not. In *United States v. Wilson*, 503 U.S. 329, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992), the Court held that it is the Attorney General, not the district court, who computes the amount of s 3585(b) time a defendant should receive as credit against his sentence. *Id.* at 332-33, 112 S.Ct. at 1353. Therefore, in order to be credited for time served prior to sentencing in this case, the

appellants must seek an administrative remedy. The district court's denial of pre-sentence credit is therefore affirmed.

Appellants Hernandez-Diaz and Gonzales also challenge various evidentiary rulings by the district court. The trial court's decision to admit testimony is reviewed under an abuse of discretion standard. *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 479 (10th Cir.1990). We find no abuse of discretion in the district court's rulings. All of the admitted evidence was relevant, none was unduly prejudicial, and no exceptions applied.

Mr. Leon appeals the application to him of a two-point sentence enhancement under U.S.S.G. § 3A1.3 for restraining a victim. Mr. Leon does not dispute that Officer Torres and Detective Gloria were restrained. Rather, he argues that Officer Torres and Detective Gloria were restrained by co-defendants Hernandez-Diaz and Gonzales in an attempt to rob them of their drugs and money. Because this action was not a reasonably foreseeable act in furtherance of the agreed-upon conspiracy (to purchase drugs), he argues that he should not be held accountable for their actions. The government counters that these events were readily foreseeable to Mr. Leon. However, the evidence strongly supports Mr. Leon's claim that he was "out of the loop" and unaware of any plan to rob Detective Gloria and Officer Torres. The government has offered no explanation of why Mr. Leon raised his hands when Mr. Hernandez-Diaz pulled his gun on Officer Torres, or why Mr. Hernandez-Diaz relieved both Mr. Leon and Officer Torres of their weapons. The record, moreover, indicates that Mr. Leon, who was the local connection between the defendants and the officers, anticipated

an on-going drug-trafficking relationship with the officers. Mr. Leon, significantly, had been promised a $10,000 payoff by Detective Gloria and Officer Torres if the sale took place. He therefore had no incentive to rob the officers—his hoped-for future partners.

Under U.S.S.G. § 1B1.3(a)(1)(B), a co-conspirator is only to be held responsible for the actions of others that are reasonably foreseeable and in furtherance of the jointly undertaken criminal activity. Mr. Leon conspired to engage in an effort to deal, not to steal, drugs. He should not be held accountable when his co-conspirators substantially altered the agreed-upon plan without his knowledge or acquiescence. Accordingly, this two-level enhancement was improperly applied.

Finally, Mr. Perez challenges the overall sufficiency of the evidence to connect him with conspiracy. We shall interpret this as a challenge to the district court's refusal to grant his motion for acquittal. Viewing the evidence in the light most favorable to the government, there was adequate evidence to connect Mr. Perez to the conspiracy to possess and distribute marijuana, and for a reasonable jury to convict him. The district court did not err in refusing to acquit Mr. Perez.

Mr. Perez also complains that his due process rights were violated because the government refused to accept his guilty plea to lesser charges unless the other co-defendants also pled guilty. "[T]here is no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). It is the prosecutor's prerogative to offer a "package deal," or no deal at all. See *United States v. Wheat*, 813 F.2d 1399, 1405 (9th Cir.1987), *aff'd* 486

U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Mr. Perez has therefore failed to state a claim for relief.

CONCLUSION

The convictions of Messrs. Gonzales, Hernandez-Diaz, Perez and Leon for possession of drugs with intent to distribute, 21 U.S.C. § 841(a)(1) and (b)(1)(D), are REVERSED. The sentences imposed on the defendants for the conspiracy and firearm convictions are VACATED, and these matters are REMANDED to the district court for resentencing in accordance with this opinion. The conviction of Mr. Perez for conspiracy is AFFIRMED.

AFFIRMED in part, REVERSED in part, VACATED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 93-2292

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MIGUEL GONZALES, DEFENDANT-APPELLANT

No. 93-2293

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ORLENIS HERNANDEZ-DIAZ, DEFENDANT-APPELLANT

No. 93-2294

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LUIS LEON, DEFENDANT-APPELLANT

No. 93-2295

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARIO PEREZ, DEFENDANT-APPELLANT

ORDER
Entered December 7, 1995

Before: HENRY and McKAY, Circuit Judges, and SHADUR*, District Judge

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*Honorable Milton I. Shadur, Senior United States District Judge, United States District for the Northern District of Illinois, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ AUDREY F. WEIGEL
AUDREY F. WEIGEL
Deputy Clerk

No. *95-1605*

In the Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ AND MARIO PEREZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MIGUEL GONZALES' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules

Other Sources

MIGUEL GONZALES' BRIEF IN OPPOSITION

Respondent, Miguel Gonzales, through counsel, hereby responds in opposition to the United States' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

FEDERAL SENTENCING GUIDELINES

United States Sentencing Commission Guidelines, (Nov. 1993), § 5G1.3 (hereinafter,"sentencing guidelines"), provides:

> (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough or escape status) or after sentencing for , but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
>
> (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.
>
> (c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

STATEMENT

In addition to the procedural history described by the United States in its Petition for Writ of Certiorari, the following is pertinent to Miguel Gonzales ("Gonzales"):

The underlying criminal conduct on which Gonzales' convictions were based took place in April, 1991. He was prosecuted and convicted in January, 1992 in a New Mexico state court. On March 10, 1992, he was sentenced to serve thirteen years in prison. His state sentence incorporated a firearm enhancement. On May 8, 1992, while he was serving his state sentence, he was indicted in federal court for federal offenses arising out of the same course of conduct. He was convicted of some of the federal charges on June 18, 1993, and was sentenced on September 29, 1993. Although the district court ordered that Gonzales' sixty month sentence for the narcotics convictions would run concurrently with his state sentence, it believed that 18 U.S.C. § 924(c) required it to order that the federal five year firearm enhancement run consecutively to the state court sentence. (R. 121, TR 698-700).

Accordingly, since Gonzales' state sentence is longer than his concurrent federal sentence, the firearm enhancement must be served **after** the completion of both his state and federal sentences. Finding this result to be in conflict with the both the legislative history of § 924(c) and the applicable sentencing guidelines, the Tenth Circuit reversed, holding that--under the unique circumstances of this case--to read § 924(c) as mandating a consecutive sentence would lead to an absurd and unreasonably harsh result at odds with Congressional intent.

REASONS FOR DENYING THE PETITION

The United States urges that the petition be granted because, it contends, the Tenth Circuit's opinion is in conflict with the decisions of other courts of appeal and because it disagrees with the mode of statutory analysis relied on by the Tenth Circuit. It argues that because 18 U.S.C. § 924(c) is "an important and widely used statute," this case requires this Court's intervention and interpretation. None of these grounds supports granting the petition.

1. The Tenth Circuit's holding in this case does not have broad implications for federal law.

Although 18 U.S.C. § 924(c) is frequently used to enhance the sentence of a defendant convicted for the use of a deadly weapon in conjunction with a federal crime of violence or drug

trafficking, the fact pattern of this case is unique and not likely to be repeated with any notable frequency. Furthermore, the Tenth Circuit's decision was narrow and confined to the specific facts before it. It decided only "whether § 924(c)'s "mandatory five-year sentence may run concurrently with a previously imposed **state** sentence that a defendant **has already begun to serve**." United States v. Gonzales, 65 F.3d 814, 819 (10th Cir. 1995) (emphasis supplied by the court).

This holding will have absolutely no effect on the vast majority of cases in which § 924(c) is applied. Accordingly, there is no real need for this Court to intervene.

2. The Tenth Circuit properly interpreted § 924(c) so that its application under the circumstances of this case would not produce a result contrary to Congressional intent.

Contrary to the United States' argument, the mode of statutory analysis utilized by the Tenth Circuit was entirely in accord with well established methods of statutory construction. Even if the language at issue[1] is not ambiguous on its face, the Tenth Circuit's analysis was entirely appropriate. As it held, the strict application of the statute's apparent prohibition against

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[1] At the time of the relevant offenses, § 924(c)(1) provided:

> Whoever, during and in relation to any ... drug trafficking crime ... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime ..., be sentenced to imprisonment for five years.... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

concurrent sentences, **under these circumstances**, would be in direct conflict both with clear legislative intent and with the sentencing guidelines. In addition, it would lead to an absurd and unreasonable result in this case.

It is important to remember that Miguel Gonzales was the subject of two consecutive prosecutions based on the same acts: the first in state court and the second in federal court. He was already serving a lengthy state sentence incorporating a state firearm enhancement when he was convicted and sentenced under the federal statutes. Under these circumstances, it is not at all clear that § 924(c) prevents the federal court from ordering that the firearm enhancement be served concurrently with the state sentence.

In contrast, had this been a single, federal prosecution, the application of § 924(c) would have been quite clear: the federal firearm enhancement would be served consecutively to the term of imprisonment imposed for the crime in which the firearm was used or carried. Under such circumstances, § 924(c) would plainly prohibit an order that the enhancement run concurrently with the sentence imposed for the underlying crime. Indeed, the Senate Report accompanying the 1984 amendment to § 924(c) direct that "the Committee intends that the mandatory sentence under the revised subsection 924(c) be served **prior** to the start of the sentence for the underlying or any other offense." S.Rep. No. 225, 98th Cong., 2d Sess. 313-14, reprinted in 1984 U.S. Code Cong. and Ad News, 3182, 3492 (quoted in 65 F.2d 814 at 821) (emphasis added). In the vast majority of cases in which the statute is applied, this directive and the language of the statute do not conflict.[2]

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[2] Indeed, the Committee Report goes on to describe the typical situation in which the application of § 924(c) is straightforward:

> For example, a person convicted of armed bank robbery in

However, because Miguel Gonzales was already in prison at the time of the federal sentencing serving a sentence imposed by a state court for convictions arising out of the same conduct, it simply would not have been possible for him to serve his mandatory sentence under § 924(c) "prior to the start of the sentence for the underlying or any other offense." Id. Accordingly, the district court's assumption that § 924(c) required that the federal firearm enhancement run consecutively to his state sentence was contrary to Congressional intent as described in the Committee Report. By ruling that the firearm enhancement could be served concurrently with the state sentence and prior to the federal sentence, the Tenth Circuit effectuated both the language of § 924(c) and Congress' directions.

3. The mode of analysis the Tenth Circuit used was appropriate.

The United States urges this Court to disregard the Committee Report's clear mandate and to find the Tenth Circuit's analysis misguided and without precedent. It argues that the courts have no choice but to apply the literal language of § 924(c) even where the result of such application in a particular instance would be unreasonable and contrary to Congress' intent. To the contrary, the Tenth Circuit's refusal to do so in this case rests solidly on considerable precedent.

As this Court has repeatedly emphasized:

> Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope. The circumstances of the enactment of particular legislation, for example, may persuade a court that Congress did not intend words of common meaning to have their literal effect. Even though, as Judge Learned Hand said, the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, nevertheless it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. . . When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.

Public Citizen v. United States Dep't. of Justice, 491 U.S. 440, 454-55 (1989) (quoting Green v. Bock Laundry Machine Co., 490 U.S. 504, 509 (1989); Watt v. Alaska, 451 U.S. 259, 266 (1981); United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543-544 (1940); Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.) and Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), **aff'd**, 326 U.S. 404 (1945)) and citing FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 432 (1986) and Church of the Holy Trinity v. United States,143 U.S. 457, 472 (1892).

As the Tenth Circuit observed, [c]ommittee reports accompanying ultimately enacted bills are a favored authoritative source of legislative history." 65 F.2d at 823, citing Thornburg v. Gingles, 478 U.S. 30, 43 n. 7 (1986). As this Court noted in Thornburg in response to an argument that the Senate Report accompanying a bill should be given little weight: "[w]e have

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> violation of section 2113 . . . (d) and of using a gun in its commission . . . would have to serve five years . . . before his sentence for the conviction under section 2113 . . . (d) could start to run.

Id.

repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill." Id., citing Garcia v. United States, 469 U.S. 70, 76, and n. 3 (1984); Zuber v. Allen, 396 U.S. 168, 186 (1969).

Accordingly, the United States' contention that the decision of the Tenth Circuit "is insupportable under any mode of statutory analysis heretofore endorsed by this Court"[3] is puzzling, at best. This Court has often relied on the Committee Report on a bill to ascertain legislative intent. The decision of the Tenth Circuit that the § 924(c) enhancement be served prior to the beginning of Gonzales' federal sentence and concurrently with his state sentence furthers that intent. Because Mr. Gonzales had already begun to serve his sentence when the § 924(c) enhancement was imposed, no other interpretation or application of that statute would further that legislative intent.[4] As in Thornburg, this Court should disapprove the United State's argument that a statute should be interpreted in a manner that would conflict with clearly articulated Congressional intent.

4. Congress did not intend that § 924(c) apply to a state sentence that a defendant is already serving at the time he is sentenced on the federal conviction.

The Committee's instruction that the gun enhancement be served "prior to the start of the sentence for the underlying or any other offense," makes it clear that Congress did not intend that the term "any other term of imprisonment" would include a sentence arising from a prior state prosecution. Common sense and the system of dual sovereignty plainly preclude a

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[3] Petition at. p. 8.

[4] See, also, Johnson v. Matthews, 751 F.Supp. 90, 92 (D.Kan. 1990) ("The legislative history of the amendment [to § 924(c)] clearly demonstrates that the mandatory sentence is to be served before any other").

congressional mandate that a federal sentence be imposed prior to the start of a state sentence, particularly when the state prosecution is initiated first and the defendant is already serving his sentence when the federal prosecution is initiated.

Moreover, as the Tenth Circuit reasoned, to apply the language of § 924(c) literally and as guided by the legislative intent set forth in the Committee Report would lead both to an absurd and an unreasonably harsh and unjust result. In order for Mr. Gonzales to serve the five year enhancement prior to his federal sentence but consecutively to his state sentence, he would serve first the thirteen years imposed by the state, then his federal gun enhancement, and then the sentence imposed for his narcotics conviction. As the Tenth Circuit observed, this would "more than double the custodial price that Congress and the Guidelines have set" for Mr. Gonzales' crimes. 65 F.3d at 821.

5. The Tenth Circuit's decision was consistent with the sentencing guidelines.

The applicable sentencing guidelines provide that where "the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." See, sentencing guidelines § 5G1.3(b). It is well established that the intended purpose of that section "is to effectively credit for guidelines purposes defendants who have already served time--generally in another jurisdiction--for the same conduct or course of conduct." United States v. Johnson, 40 F.3d 1079, 1082 (10th Cir.1994) (quoting United States v. Flowers, 13 F.3d 395, 397 (11th Cir.1994)).

Thus, "[i]f the all-encompassing reading of Sec. 924(c) were adopted so that the

gun-charge sentence would have to follow the service of the entire pre-existing state sentence and precede the federal sentence covering the identical conduct, § 5G1.3's concurrent sentencing scheme would be rendered nugatory." 65 F.2d at 822. Courts should attempt to harmonize, rather than negate, the provisions of the sentencing guidelines in their application of federal sentencing statutes. See, United States v. Shewmaker, 936 F.2d 1124, 1128 (10th Cir. 1991), citing United States v. Fossett, 881 F.2d 976, 980 (11th Cir. 1989).

The United States' contention that guidelines § 2K2.4 (requiring the sentencing court to sentence a defendant convicted of a § 924(c) violation for the term set forth in that statute) commands a different result is misplaced. See, Petition at p. 11. The Commentary and Application Notes to that section specifically proscribe "double counting" where a previous sentence was based in any part on the use of a firearm.[5] Accordingly, § 2K2.4 also supports the Tenth Circuit's result. See, also, ¶ 2 of the Application Notes to § 2K2.4 (proscribing an upward departure in excess of the maximum of the guideline range that would have resulted had there not been a conviction under § 924(c)).

Finally, ¶ 5 of the Application Notes to § 5G1.3 provides:

> Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

The guidelines specifically endorse the Tenth Circuit's authority to adjust Mr. Gonzales' sentence so that it would not more than double the custodial price set for his crimes. In

[5] As noted above, Gonzales' state sentence incorporated a firearm enhancement.

short, neither § 924(c) nor the guidelines require that a defendant who received and is serving a state sentence of thirteen years and has received a five year federal sentence for the same conduct must serve his federal firearm enhancement consecutively and in addition to those sentences. To the contrary, such a ruling would be contrary to both clear congressional intent and the mandate of the sentencing guidelines. The Tenth Circuit used well recognized principles of statutory construction and appropriately harmonized the statute and the guidelines to further the goals of both. Its holding should not be disturbed.

CONCLUSION

For the foregoing reasons, this Court should deny the United States' Petition for a Writ of Certiorari.

Respectfully Submitted:

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C E R T I F I C A T E O F S E R V I C E

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No. 95-1605

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ AND MARIO PEREZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORLENIS HERNANDEZ-DIAZ' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases, Con't.:

Statutes and rules:

United States Sentencing Commission Guidelines (Nov. 1993)

Other Sources:

Sentencing Guidelines Commentary and Guidelines

ORLENIS HERNANDEZ-DIAZ' BRIEF IN OPPOSITION

Respondent, Orlenis Hernandez-Diaz, through counsel, submits the following response in opposition to the United States' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

SENTENCING GUIDELINES INVOLVED

United States Sentencing Commission Guidelines, (Nov. 1993) (hereinafter, "Sentencing Guidelines" or "Guidelines"), § 5G1.3(b), provides:

> (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

STATEMENT

Orlenis Hernandez-Diaz ("Hernandez") submits the following supplementary statement:

This case arose out of a "reverse sting" operation by the Albuquerque Police Department in early 1991. The sentences at issue here are all based on the same criminal conduct in April, 1991 leading to Hernandez' arrest on April 23, 1992.

After a trial by jury in state court, Hernandez was convicted of five substantive state offenses, four of which bore a firearm enhancement. On March 24, 1992 Hernandez was sentenced to twenty two years in the custody of the New Mexico Department of Corrections. Seven and one half years of the sentence were suspended, leaving fourteen and one half years to be served.

On May 8, 1992, Hernandez-Diaz was indicted in federal court for federal offenses

arising out of the same set of facts and the same firearms as the state convictions for which he was already serving time. On June 18, 1993, he was convicted of the federal charges of possession of less than fifty kilograms of marijuana, conspiracy to distribute less than fifty kilograms of marijuana and the use of a firearm during a drug transaction. (Doc. 103). On October 6, 1993, he was sentenced to sixty months on each of the possession and conspiracy charges. The district court ordered that the sentences for possession and conspiracy run concurrently with Hernandez' state sentence. However, it imposed a five-year firearm enhancement pursuant to 18 U.S.C. § 924(c) to run consecutively to his 14.5 year state sentence. (Doc. 125, TR at 683-84).

On appeal, the Tenth Circuit reversed the district court's consecutive imposition of the mandatory five-year firearm enhancement, ruling that the sentence could run concurrently with the previously imposed state sentence Hernandez had already begun to serve. It reasoned that where a literal reading of statutory language would produce an absurd result that is contrary to congressional intent, the courts can and should adopt a more sensible construction. The United States' petition for certiorari challenges this holding.

THE PETITION SHOULD BE DENIED

The United States argues that this Court should grant its petition to restore uniformity to an "important area of federal law."[1] It contends that the "plain language" of § 924(c) should control and that because the statute requires that a firearm enhancement shall not run concurrently with "any other term of imprisonment," its "plain language" must include a state

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[1] Petition at p. 8.

sentence.[3] Finally, it urges that "the result produced by the plain language of § 924(c) cannot fairly be labeled absurd."[4] Because the Tenth Circuit's opinion was correct under the circumstances of this case, the United States' Petition should not be granted.

A. THE "PLAIN LANGUAGE" OF THE STATUTE DOES NOT REQUIRE A CONCLUSION THAT A FIREARM ENHANCEMENT RUN CONSECUTIVELY TO A STATE SENTENCE

18 U.S.C. § 924(c)(1) provides in pertinent part that:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

The United States argues that by the use of the term "any" in the last sentence, § 924(c) "manifests an intent" to reach both state and federal sentences.[5] This "plain language," it contends, cannot be read to apply only to federal sentences.[6]

In so arguing, the United States ignores the operative fact on which the Tenth Circuit's holding was premised: Hernandez was **already** serving a state sentence for the **same conduct**

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[3] Petition at pp. 8-9.

[4] Petition at p. 11.

[5] Petition at p. 9.

[6] Petition at p. 11.

when he was sentenced for the federal crimes. United States v. Gonzales, 65 F.3d 814, 819 (10th Cir. 1995). Under somewhat analogous circumstances, this Court has previously held that similar "plain language" in a federal statute did not apply to a detention by state officers on state charges, regardless of the apparent breadth of the language Congress chose to use.

In United States v. Alvarez-Sanchez, ___ U.S. ___, 114 S.Ct. 1599 (1994), this Court held that the delay between the defendant's arrest on state narcotics charges and his presentment to a federal magistrate on subsequent federal charges did not require the suppression of his inculpatory statement to federal agents made while he was in state custody on the state charges, despite the plain language of 18 U.S.C. § 3501(c), which provides that a confession made while a defendant is "under arrest or other detention in the custody of **any** law enforcement officer" is not inadmissible solely because of a delay in bringing that person before a federal magistrate. (emphasis added).

It explained:

> We believe respondent errs in placing dispositive weight on the broad statutory reference to "any" law enforcement officer or agency without considering the rest of the statute. . . . . there can be no "delay" in bringing a person before a federal magistrate until, at a minimum, there is some obligation to bring the person before such a judicial officer in the first place. Plainly, a duty to present a person to a federal magistrate does not arise until the person has been arrested for a federal offense. . . . Until a person is arrested or detained for a federal crime, there is no duty, obligation, or reason to bring him before a judicial officer "empowered to commit persons charged with offenses against the laws of the United States," and therefore, no "delay" under Sec. 3501(c) can occur.

___ U.S. at ___, 114 S.Ct. at 1603-1604. Thus, to construe the word "any" as applicable to state officers who have detained the defendant on state charges would lead to an unworkable and

absurd result. Accordingly, it concluded that Congress must have intended the statute to apply only to federal charges despite its use of the phrase "any law enforcement officer." It could not have intended to reach a detention by state officers on state charges.

Likewise, in this case the Tenth Circuit properly concluded that the mechanical and literal application of the word "any" in § 924(c) would lead to an unworkable result.

As it observed, the Senate Report accompanying the 1984 amendment to § 924(c) directs that "the Committee intends that the mandatory sentence under the revised subsection 924(c) be served **prior** to the start of the sentence for the underlying or any other offense." S.Rep. No. 225, 98th Cong., 2d Sess. 313-14, reprinted in 1984 U.S. Code Cong. and Ad News, 3182, 3492 (quoted in 65 F.2d 814 at 821) (emphasis added).

Thus, because Hernandez was already serving a sentence imposed by a state court for convictions arising out of the same conduct, it simply would not have been possible for him to serve his mandatory sentence under § 924(c) "prior to the start of the sentence for the underlying or any other offense." Id. Under these circumstances, "any other term of imprisonment" could **only** mean any other *federal* term of imprisonment. The United States' attempt to place dispositive weight on the broad statutory reference to "any other term of imprisonment" without considering the context or purpose of the statute or its legislative history is erroneous. 114 S.Ct. at 1603. See, e.g., Public Citizen v. United States Dep't. of Justice, 491 U.S. 440, 454-55 (1989) ("Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope"). Statutory language, however "plain," cannot be read in a vacuum. King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991) ("The meaning of statutory language, plain or not, depends on context").

B. THE PETITION IGNORES SOLID PRINCIPLES OF STATUTORY CONSTRUCTION

As this Court has repeatedly held, where there is any ambiguity with respect to the application of a criminal statute, it must "resolve any doubt in favor of the defendant." Ratzlaff v. United States, __ U.S. __, 114 S.Ct. 655, 663 (1994), citing Hughey v. United States, 494 U.S. 152, 160 (1990) (principles of lenity "demand resolution of ambiguities in criminal statutes in favor of the defendant"). This Court has explicitly relied on this principle to resolve ambiguities in the application of 18 U.S.C. § 924(c) in favor of the defendant.

In Simpson v. United States, 435 U.S. 6 (1978), the defendants were convicted in federal court in two separate trials of two separate aggravated bank robberies and of using firearms to commit the robberies. The district court sentenced them to consecutive terms of imprisonment on the robbery and firearm counts under 18 U.S.C. § 2113(a) and (d) and 18 U.S.C. § 924(c).[6] On appeal, the Sixth Circuit affirmed the imposition of consecutive firearm enhancement sentences under both statutes.

This Court granted certiorari to review whether §§ 2113(d) and 924(c) should be construed to authorize, in the case of a bank robbery committed with firearms, not only the imposition of the increased penalty under § 2113(d), but also the imposition of an additional consecutive penalty under §924(c). It held that the statutes could not be so construed--despite their plain language. It reasoned that in a prosecution growing out of a single transaction of

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[6] At the time the petitioners were sentenced, the punishment for bank robbery under 18 U.S.C. § 2113(a) could be enhanced under § 2113(d) when the robbery is committed "by the use of a dangerous weapon or device." 18 U.S.C. § 924(c) provided that whoever "uses a firearm to commit any felony for which he may be prosecuted in a court of the United States," shall be subject to a penalty in addition to the punishment provided for the commission of such felony.

bank robbery with firearms, both the legislative history of § 924(c) and principles of lenity required a conclusion that a defendant could not be sentenced under both § 2113(d) and § 924(c). As it said, " . . . to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(d) would violate the established rule of construction that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 435 U.S. at 14-15 (quoting United States v. Bass, 404 U.S. 336, 347 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971) and citing Adamo Wrecking Co. v. United States, 434 U.S. 275, 284-285 (1978)).

Reliance on the principle of lenity is critical where the legislative history of a criminal statute is sparse or equivocal. 435 U.S. at 15, quoting Ladner v. United States, 358 U.S. 169, 178 (1958) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended"). However, as the Tenth Circuit found in this case, the legislative history of the 1984 amendment to § 924(c), the version applicable here, makes it clear that Congress did not intend that the statutory firearm enhancement it requires could not be imposed concurrently to a state sentence that a defendant was already serving for the same conduct on which the federal sentence is based.

As it noted, the strongest indication of Congress' intent in enacting the 1984 amendment is found in the Senate Report that accompanied the 1984 amendment to § 924(c), which reads:

> In either case, the defendant could not be given a suspended or probationary sentence, nor could any sentence under the revised subsection be made to run concurrently with that for the predicate crime or with that for any other offense. **In addition, the Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense.**

S.Rep. No. 225, 98th Cong., 2d Sess. at 313-14 ,quoted at 65 F.3d. 820) (emphasis added by the Tenth Circuit).

The Committee's instruction that the gun enhancement be served "prior to the start of the sentence for the underlying or any other offense," indicates that Congress did not intend the term "any other term of imprisonment" to apply to a sentence arising from a prior state prosecution under the circumstances here. In this case, Hernandez' federal sentence could not have been be imposed prior to the start of his state sentence. Thus, the district court's consecutive imposition of the federal firearm enhancement was contrary to Congress' intent in enacting § 924(c).[7]

Additionally, as the Tenth Circuit explained, to apply the language of § 924(c) literally and as guided by the legislative intent set forth in the Committee Report would lead both to an absurd and an unreasonably harsh and unjust result. In order for Mr. Hernandez to serve the five year enhancement prior to his federal sentence but consecutively to his state sentence, he would serve first the 14.5 years imposed by the state, then his federal gun enhancement, and then the sentence imposed for his federal narcotics convictions. This would "more than double the custodial price that Congress and the Guidelines have set" for his crimes. 65 F.3d at 821.

In short, the decision of the Tenth Circuit plainly is **not** "insupportable under any mode

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[7] The Tenth Circuit appropriately reasoned that "[c]ommittee reports accompanying ultimately enacted bills are a favored authoritative source of legislative history." 65 F.2d at 823, n.4. This reasoning finds abundant support in the decisions of this Court. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 43 n. 7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill") (citing Garcia v. United States, 469 U.S. 70, 76, and n. 3 (1984); Zuber v. Allen, 396 U.S. 168, 186 (1969)).

of statutory analysis heretofore endorsed by this Court."[8] To the contrary, the decision of the Tenth Circuit that the § 924(c) enhancement may be served prior to the beginning of Hernandez' federal sentence and concurrently with his state sentence finds abundant support in very well-established principles repeatedly relied on by this Court.

C. THE SENTENCING GUIDELINES SUPPORT THE TENTH CIRCUIT'S HOLDING

Both the plain language of the Sentencing Guidelines and the Commentary to the Guidelines provide additional support for the Tenth Circuit's holding in this matter. In particular, § 5G1.3(b) applies where a defendant is prosecuted twice for the same underlying conduct and provides, in pertinent part, that where "the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." As the federal appellate courts have noted, "[t]he intended purpose of § 5G1.3(b) is to effectively credit for guidelines purposes defendants who have already served time--generally in another jurisdiction--for the same conduct or course of conduct." United States v. Johnson, 40 F.3d 1079, 1082 (10th Cir.1994) (quoting United States v. Flowers, 13 F.3d 395, 397 (11th Cir.1994)). Therefore, "[i]f the all-encompassing reading of Sec. 924(c) were adopted so that the gun-charge sentence would have to follow the service of the entire pre-existing state sentence and precede the federal sentence covering the identical conduct, § 5G1.3's concurrent sentencing scheme would be rendered nugatory." 65 F.2d at 822.

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[8] Petition at p. 8.

Again, such a result would clearly be contrary to Congressional intent in enacting the 1984 Sentencing Reform Act:

> The Sentencing Reform Act of 1984, as amended . . . created the Sentencing Commission , 28 U.S.C. § 991(a), and charged it with the task of establishing sentencing policies and practices for the Federal criminal justice system. The Commission executed this function by promulgating the Guidelines Manual . . . . As we have observed, 'the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in a criminal case.

Stinson v. United States, ___ U.S. ___, 113 S.Ct. 1913, 1916-1917 (1993) (quoting Mistretta v. United States, 488 U.S. 361, 391 (1989) (other citations omitted).

Because the Guidelines are binding on the federal courts, those courts are required to harmonize, rather than negate, the provisions of the sentencing guidelines in their application of federal sentencing statutes. See, United States v. Shewmaker, 936 F.2d 1124, 1128 (10th Cir. 1991), citing United States v. Fossett, 881 F.2d 976, 980 (11th Cir. 1989).

Moreover, the Commentary to the Guidelines is likewise generally binding on the federal courts, as are the Policy Statements promulgated by the Commission.[9] Stinson, ___ U.S. at ___, 113 S.Ct. at 1917. The Commentary to § 5G1.3 provides, in pertinent part, that:

> Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of

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[9] The Policy Statement to § 5G1.3 provides:

> In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Again, this policy underscores Congressional intent that neither the statutes nor the Guidelines be used to impose a total sentence well in excess of that set forth in the Guidelines.

> imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

See, ¶ 5 of the Application Notes. This Commentary also authorizes the Tenth Circuit's adjustment of Hernandez' sentence so that it would not more than double the custodial price set for his crimes.

The United States' contention that Guidelines § 2K2.4 commands a different result is erroneous.[10] § 2K2.4 requires only that the sentencing court sentence a defendant convicted of a § 924(c) violation for the five year term set forth in that statute. The Commentary to that section specifically prohibits "double counting" where a previous sentence was based in any part on the use of a firearm. Because Hernandez' state sentence incorporated firearm enhancements with respect to four out of the five state offenses of which he was convicted, the imposition of a consecutive federal firearm enhancement would subject him to an impermissible double penalty arising out of the same use of the same gun.

Moreover, the Commentary to § 2K2.4 also provides (with respect to upward departures) that a sentence should not exceed the maximum of the guideline range that would have resulted had there not been a § 924(c) conviction. Because to require that Hernandez' § 924(c) firearm enhancement run consecutively to his state sentence would more than double the sentence set by Congress and the Guidelines for his total criminal conduct, § 2K2.4 also supports the Tenth Circuit's result.

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[10] Petition at p. 11.

D. GRANTING THE PETITION IS NOT NECESSARY TO RESTORE UNIFORMITY TO AN "IMPORTANT AREA OF FEDERAL LAW"

The United States argues that this Court must resolve a split in the circuits and intervene to "restore uniformity to this important area of federal law."[11] Its argument is unavailing for two reasons. First, the question answered by the Tenth Circuit--"whether § 924(c)'s "mandatory five-year sentence may run concurrently with a previously imposed **state** sentence that a defendant **has already begun to serve**"--is narrow and limited to a set of unique facts that do not often arise. United States v. Gonzales, 65 F.3d at 819 (emphasis supplied by the court). Its holding will not have broad implications for an important area of federal law.

Second, the Tenth Circuit's holding was premised in large part on the excessive total sentence that resulted from requiring the federal firearm enhancement to run consecutively with Hernandez' state sentence. As discussed above, the total sentence imposed on Mr. Hernandez by the district court's "literal" application of § 924(c) far exceeded the maximum possible under the Guidelines for the same criminal conduct. This result was contrary to the clear mandate of both the Guidelines and the Commentary to the Guidelines, and required reversal for that reason alone. Not only is this not a situation likely to be repeated with great frequency, but the appellate court was required to correct the conflict under these circumstances and properly did so.

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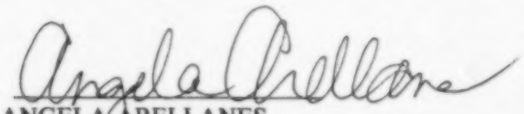
[11] Petition at p. 8.

CONCLUSION

For the foregoing reasons, this Court should deny the United States' Petition for a Writ of Certiorari.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

This certifies a true and accurate copy of this Brief In Oppostions To Petition For Certiorari was sent by first class mail to the following interested parties on May 23, 1996, at the last known addresses:

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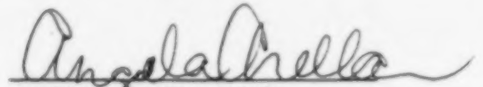

ANGELA ARELLANES

JUN 14 PAGE 2

ORIGINAL (9)

NO. 95-1605

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARIO PEREZ' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules

United States Sentencing Commission Guidelines (Nov. 1993)

Other Sources

MARIO PEREZ' BRIEF IN OPPOSITION

Respondent, Mario Perez, by and through his Court Appointed counsel, hereby respectfully submits the following in opposition to the United States' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

FEDERAL SENTENCING GUIDELINES

United States Sentencing Commission Guidelines, (Nov. 1993) Section 5G1.3(b)(c) (hereinafter "Sentencing Guidelines"), provides:

> (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.
>
> (c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

STATEMENT

The Respondent Mario Perez ("Perez) submits the following statement.

Perez was arrested in the State of Florida on April 23, 1991 pursuant to an arrest warrant issued by the Second Judicial District Court, County of Bernalillo, State of New Mexico under CR. NO. 91-0776. An Indictment had been returned charging the defendant with Armed Robbery, Attempt to Commit Armed Robbery of Marijuana, Conspiracy to Commit Possession of Marijuana Over eight ounces, and Eluding an Officer. On February 11, 1992, a jury returned guilty verdicts on the charges. Perez was sentenced to seventeen years imprisonment which included Firearm Enhancement one year for each offense, excluding Eluding an Officer pursuant to Section 31-18-16 NMSA, 1978, and placed in custody.

On May 8, 1992, a Federal Grand Jury returned a six-count Indictment under CR. NO. 92-236 JC . charging Perez with Count I, Conspiracy to Possess with Intent to Distribute Less than 50 Kilograms of Marijuana, in violation of 21 U.S.C. Section 846; Aiding and Abetting, 18 U.S.C. Section 2; Count II, Carrying or Use of a Firearm During or in Relation to a Drug Trafficking Crime in violation of 18 U.S.C. Section 924 (c)(1), 18 U.S.C. Section 924 (a)(2) and Aiding and Abetting, 18 U.S.C. Section 2; Count VI, Possession with Intent to Distribute Less Than 50 kilograms of Marijuana in violation of 21 U.S.C. Section 841 (a)(1) and 21 U.S.C. Section 841 (b)(1)(D).

On June 11, 1993, the United States Attorney for the District of New Mexico filed an Enhancement Information charging the defendant with prior felony convictions.

The Federal Indictment was based on the identical set of facts as the state charges and subsequent convictions.

On June 18, 1993, pursuant to a jury trial before the United States District Court for the District of New Mexico, Perez was found guilty to Counts I, II, and VI, of the Indictment and sentenced to a term of imprisonment of 12.25 years, including 5 years for the use of a firearm.

The Tenth Circuit has held that a combined reading, under which the five-year sentence on the Section 924(c) gun count would have to follow a previously imposed state sentence and would have to precede a corresponding federal sentence would be a total of 29.25 years for Perez. The Tenth Circuit has held that "this approach would more than double the custodial price that Congress and the Guidelines have set for committing the total criminal conduct engaged in by these defendants".

RESPONDENT RESPECTFULLY REQUESTS THAT THE PETITION BE DENIED

The United States prays that the petition be granted because it submits that the Tenth Circuit's opinion is inconsistent with that of the Eleventh and Sixth Circuits (Petition at pg. 7) and further that because 18 U.S.C. 924(c) is an important and widely used statute, the court of appeals' error calls for correction by this Court.

Perez incorporates by reference the Briefs in Opposition submitted by co-respondents counsel, Edward O. Bustamante, Esq., on behalf of Miguel Gonzales and Angela Arrellanes, Esq., on behalf of Orlenis Hernandez-Diaz.

I. Perez submits that the Tenth Circuit holding in this case is based only on the unique facts relevant to the case and does not have broad implications sufficient to warrant a grant of the Petition.

The Tenth Circuit in its opinion interpreted the statute as follows:

> Where a literal reading of the statutory language would produce an absurd result- particularly one clearly not contemplated by Congress- Courts will adopt a more sensible statutory construction. Church of the Holy Trinity v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892).
>
> Where a literal reading of a statutory term would "compel an odd result," we must search for other evidence of congressional intent to lend the term its proper scope.... Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intent.

Perez submits that the intent of the statute was not for the purposes of exposing individuals to sentences duplicative to state sentences where firearm enhancements already attached. As above described, Perez' state sentence was enhanced one year for Counts 1, and 2, Armed Robbery, Count 3 Armed Robbery of Marijuana, Count 4, Conspiracy to Commit Armed Robbery, Count 5, False Imprisonment. Clearly, the imposition of the 924 (c) to be consecutive to the state sentences increasing the total of 10 years is precisely the type of anomaly and absurd result which the Tenth Circuit concludes was not intended by Congress. The United States has not presented any authority or set of

facts which are remotely similar to this case. Accordingly, to suggest that this decision has broad implications is without merit.

II. The Tenth Circuit correctly holds that the statute applies to any other federal term of imprisonment.

The Tenth Circuit concludes that the phrase "any other offense" encompasses only federal offenses is required if they are to follow Congress' stated intent that Section 924(c) sentences be served prior to "any other offense," for if a defendant is sentenced in state court first, there is no way in which a later-sentencing federal court can cause the mandatory five-year Section 924(c) sentence to be served before a state sentence that is already being served.

As stated above, Perez has been serving the state sentence since his arrest on April 23, 1991. Accordingly, the federal imposition of a consecutive term for the Section 924(c) violation is inapplicable.

III. The Tenth Circuit is correct in finding that the District Court's application of a consecutive sentence for the 924(c) is "anomalously" harsh and that the application of Sentencing Guidelines Section 5G1.3 provides for a concurrent sentence

Perez submits that the only applicable section for consideration is Section 5G1.3(b). Subsection (a) is not applicable to this case as Perez did not commit the offense will serving a term of imprisonment, or after sentencing for , but before commencing service of such term of imprisonment. Accordingly, pursuant to the Sentencing Guidelines, Subsection (b) is applicable if subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment. Furthermore, Perez submits that subsection (c) is particularly applicable in that the court may impose a sentence

concurrently to achieve a reasonable punishment and avoid unwarranted disparity. Perez respectfully submits that the Tenth Circuits' review of all of the circumstances and in particular the unduly harsh results that attach warrant the finding of concurrent sentencing.

Finally, Perez respectfully submits that the imposition of consecutive sentencing by the District Court is tantamount to cruel and unusual punishment. While the Tenth Circuit did not address this constitutional right, Perez submits that under the totality of the circumstances consideration of the Eighth Amendment by this Court is warranted. The Cruel and Unusual Punishment Clause of the Eight Amendment prohibits punishment grossly disproportionate to the severity of the offense. Ingraham v. Wright, 430 U.S. 651 (1970). Perez does not argue that standing alone, the Section 924(c) consecutive sentencing provision is disproportionate to the offense. As noted by the Tenth Circuit, "the adoption of a reading that Section 924(c) prohibition against concurrent sentences refers only to federal sentences does not at all depreciate the severity of the crimes involved." Perez argues that imposition of Section 924(c) firearm enhancement to an already state statute attaching firearm enhancement results in a grossly disproportionate sentence and unduly harsh.

In Solem v. Helm, 463 U.S. 277 (1983), the Supreme Court posited three criteria for analyzing the proportionality of sentences: (1) a comparison of the gravity of the offense with the harshness of the penalty: (2) a comparison of the sentence with those imposed for various offenses in the same jurisdiction; and (3) a comparison of the sentence with those imposed for the same or similar offenses in other jurisdictions. Solem, 436 U.S. at 292.

Perez respectfully submits that the sentences imposed by the District Court and the consecutive five year term as provided by Section 924(c) establishes a term of imprisonment which is incomparable to any other sentences for similar criminal acts in the same or other jurisdictions. As the Tenth Circuit noted in its decision, if the consecutive provisions of the sentencing guidelines are imposed, Perez and co-respondents would be sentenced to more than double the custodial price that Congress and the Guidelines have set for committing the total criminal conduct engaged in.

Perez respectfully submits that the Tenth Circuit's Vacation of the sentences imposed are consistent with the intent of Congress as provided for by the authorities of the Sentencing Guidelines as well as Section 924(c).

CONCLUSION

For the foregoing reasons, this Court should deny the United States' Petition for a Writ of Certiorari.

Respectfully submitted:

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*Attorney and Counselor at Law**

**Also Admitted New York State*

May 30, 1996

Mr. William Suter
Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

Re: U.S.A. v. MARIO PEREZ, No. 95-1605

Dear Mr. Suter:

Please accept this letter as a request for an extension to the deadline in which to file the brief in opposition to the petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. The Petition was filed April 5, 1996, by the Office of the Solicitor General. Pursuant to S. Ct. Rule 15.2 a brief in opposition was due 30 days thereafter. The deadline expired May 6, 1996. Counsel has been in United States District Court in the United States vs. Richard Haworth, et. al., Criminal No. 95-491 LH in which his client is one of seventeen defendants. Trial on this matter has been scheduled for August 1996, which has been preceded by numerous motions before the Court as well as numerous scheduling conferences. In addition, counsel serves as a Zoning Hearing Examiner/Administrative Judge and during the months of April and May of 1996, was required to preside in over eighty administrative hearings.

Due to the press of business, counsel was unable to file the brief in opposition and respectfully request to June 6, in which to do so. If there are any questions or concerns, please contact me.

Thank you for your courtesies.

Sincerely,

ROBERTO ALBERTORIO

cc: Drew S. Days, III
Solicitor General

Miguel Estrada
Assistant to the
Solicitor General

Angela Arellanes, Attorney for Orlenis Hernandez-Diaz
Edward Bustamante, Attorney for Miguel Gonzales

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(4)

No. 95-1605

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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8 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1605

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents do not dispute that the courts of appeals are divided on the question presented by the petition—whether a court has authority to order a sentence imposed under 18 U.S.C. 924(c) to run concurrently with a state-law sentence that the defendant is already serving. As the Tenth Circuit conceded (Pet. App. 10a), every court of appeals that has considered the question presented by the petition has disagreed with the conclusion reached by the Tenth Circuit in this case.

Respondents nevertheless contend that "there is no real need for this Court to intervene" (Gonzales Br. in Opp. 3), because the decision below is "narrow" (*ibid.*; Hernandez-Diaz Br. in Opp. 12) because it deals

only with defendants who have previously been prosecuted in state court. It is not uncommon, however, for defendants who are prosecuted in federal court to be subject to undischarged state sentences. Indeed, that is demonstrated by the decisions from other circuits with which the Tenth Circuit expressly disagreed.

In addition, the Tenth Circuit's analysis is not obviously confined to prisoners serving state sentences. The Tenth Circuit determined, without any support in the statutory language, that Congress's "stated intent" was that a Section 924(c) sentence must be served before any other sentence. Pet. App. 16a. From that premise, it reasoned that Section 924(c) sentences may be made concurrent "with a state sentence that is already being served," *ibid.*, because in those cases it is not possible to comply with Congress's purported intent that the Section 924(c) sentence be served first. The same reasoning would also lead to the conclusion that a Section 924(c) sentence may run concurrently with any *federal* sentence that the defendant already is serving. The result of the court of appeals' analysis may be, therefore, that, in the Tenth Circuit, Section 924(c) sentences can run consecutively only to sentences that are imposed at the same time when the defendant is sentenced for the Section 924(c) offense. Such a rewriting of the expansive language that Congress chose for this important criminal statute warrants correction by the Court.

2. Respondents devote the bulk of their arguments to a defense of the decision below. The court's reasoning, however, cannot be reconciled with the text of the statute.

Respondent Hernandez-Diaz contends (Br. in Opp. 4-5) that *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599 (1994), supports the court of appeals' decision, because that case interpreted the phrase "arrest * * * [by] any law-enforcement officer" in 18 U.S.C. 3501(c) to refer only to arrests effected for violations of federal law. That contention is wrong. *Alvarez-Sanchez* specifically held, relying on the plain meaning of the word "any," that the phrase "any * * * officer" includes "federal, state, or local" officers. 114 S. Ct. at 1604. The Court's conclusion that Section 3501(c) refers only to arrests for violations of federal law relied on the statute's textual concern with "delay" in bringing an accused before a judge authorized to grant or deny bail for "offenses against the laws of the United States or of the District of Columbia." 18 U.S.C. 3501(c); *Alvarez-Sanchez*, 114 S. Ct. at 1603-1604. The Court explained that such "delay" cannot occur until there is a "duty" to present a person to a federal magistrate, and that the "delay" covered by Section 3501(c) therefore requires an arrest for a federal crime. 114 S. Ct. at 1604.

No similar contextual limitation on the phrase "any other term of imprisonment" justifies imposing a "federal crime" gloss on the last sentence of Section 924(c). Indeed, as we have pointed out (Pet. 9-10), language limiting the broad sweep of the word "any" to federal crimes is found in the first sentence of Section 924(c), thus demonstrating Congress's ability to express such a restriction when it so desires. The Tenth Circuit erred when it imported the same "federal crime" limitation into the last sentence of Section 924(c). See, *e.g.*, *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994) ("[w]here Congress includes particular language in one section of a statute but omits it in an-

other section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); accord *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

Respondent Hernandez-Diaz is not assisted by the rule of lenity. Br. in Opp. 6-9. That rule "applies only when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States* v. *Shabani*, 115 S. Ct. 382, 386 (1994); see also *Reno* v. *Koray*, 115 S. Ct. 2021, 2029 (1995). Respondent's view that Section 924(c) is ambiguous is based on his claim that "the strongest indication of Congress' intent" (Hernandez-Diaz Br. in Opp. 7-8) is found in the 1984 Senate Committee Report that reflects an expectation that Section 924(c) sentences be served before other sentences. As we have explained (Pet. 12), however, Congress did not enact textual requirements in Section 924(c) regarding the sequence in which sentences under that Section and other sentences shall be served; it required only that they not run concurrently. Legislative history regarding the Committee's intent cannot create "ambiguity" in clear statutory language.

Nor have respondents' supported their claim that applying Section 924(c) as written would lead to absurd results, because their sentences would be "unreasonably harsh and unjust." Hernandez-Diaz Br. in Opp. 8; see also Gonzales Br. in Opp. 8. There is nothing "absurd" in requiring lengthy terms of incarceration for defendants who use firearms in the commission of dangerous felonies and who are already subject to other prison sentences. That conclusion is not changed by the fact (Hernandez-Diaz Br. in Opp. 7; Gonzales Br. in Opp. 7-8; Perez Br. in Opp. 3) that

respondents' state convictions and sentences arose from the same events that led to their federal prosecutions. The permissibility of such cumulative prosecutions and punishments has long been established, see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187 (1959), and Congress must be deemed to have been aware of that "commonplace[]" feature of our federal system when it enacted Section 924(c). *Callanan* v. *United States*, 364 U.S. 587, 594 (1961); see also *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988).*

Finally, respondents contend that the result below is supported by Sentencing Guidelines § 5G1.3, which they contend would require a concurrent sentence in the circumstances of this case. See Hernandez-Diaz Br. in Opp. 9-11; Gonzales Br. in Opp. 8-10; Perez Br. in Opp. 4-5. As we have already explained (Pet. 11), however, that Guidelines provision simply implements 18 U.S.C. 3584(a), the general statute that addresses the subject of concurrent and consecutive sentences. The specific mandate of Section 924(c)

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* Indeed, the 1984 amendments to Section 924(c) cannot be squared with respondents' argument. Those amendments were principally intended to repudiate *Busic* v. *United States*, 446 U.S. 398 (1980), and *Simpson* v. *United States*, 435 U.S. 6 (1978), where this Court had held Section 924(c) inapplicable when the underlying offense provided its own enhancement provision for use of a dangerous weapon in the commission of the offense. After the 1984 amendments, Section 924(c) requires a consecutive sentence even when the defendant has already been prosecuted and sentenced for another offense that carries an enhanced punishment because of the use of the same firearm. Given that the entire point of the 1984 amendments was to ensure cumulative punishments under Section 924(c) and any other crime that the defendant committed at the same time, respondents' plea that such result is "absurd" is particularly strained.

controls over the general provisions of Section 3584(a) not only under elementary canons of construction, see *Gozlon-Peretz*, 498 U.S. at 407; *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987), but also because Congress expressly provided that "[n]otwithstanding any other provision of law" sentences under Section 924(c) must be consecutive to "any other term of imprisonment." 18 U.S.C. 924(c). That direction expressly displaces the statutory provisions on which respondents rely.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JUNE 1996

(5)

No. 95-1605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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Petition for a Writ of Certiorari Filed April 4, 1996
Certiorari Granted June 17, 1996

164 pp

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IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1605

UNITED STATES OF AMERICA, PETITIONER

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MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS

U.S. DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO (ALBUQUERQUE)

CRIMINAL DOCKET FOR CASE #: 92-CR-236-ALL

USA v. Leon, et al — Filed: 05/08/92
Dkt# in other court: None

Case Assigned to: Judge John E. Conway

LUIS LEON (1)	Alonzo J. Padilla, Esq. [term 10/06/93] [COR LD NTC cja] Alonzo Padilla Law Office 320 Gold Avenue, SW #1440 Albuguerque, NM 87102 (505) 843-9629
12/23/67;000-00-0000 defendant [term 10/06/93]	

Pending Counts:	Disposition
21:846 CONSPIRACY (1)	CBOP 60 months concurrent with State sentence; 3 years supervised release; with special conditions; SPA $150.00; deft held in custody (1)
18:924(c)(1) & 18:924 (a)(2) POSSESSION OF A FIREARM IN USE OF A DRUG TRAFFICKING CRIME (4)	CBOP 60 months concurrent with State sentence; 3 years years supervised release; with special conditions; SPA $150.00; deft held in custody (4)

21:841(a)(1) & 21:841(b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE LESS THAN 50 KILOGRAMS OF MARIJUANA; 18:2 AIDING AND ABETTING (6)	CBOP 60 months concurrent with State sentence; 3 years supervised release; with special conditions; SPA $150.00; deft held in custody (6)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

Case Assigned to: Judge John E. Conway

ORLENIS HERNANDEZ-DIAZ (2) defendant [term 10/06/93]	Angela Arellanes, Esq. [term 10/06/93] (505) 247-2417 [COR LD NTC cja] 800 Park Avenue, SW Albuquerque, NM 87102 (505) 842-5808

Pending Counts:	Disposition
21:846 CONSPIRACY (1)	CBOP 60 months concurrent with state sentence; with special conditions; SPA $150.00; deft held in custody (1)
18:924(c)(1) & 18:924(a)(2) POSSESSION OF A	CBOP 60 months concurrent with state sentence;

FIREARM IN USE OF A DRUG TRAFFICKING CRIME (3)	with special conditions; A SPA $150.00; deft held in custody (3)
21:841(a)(1) & 21:841(b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE LESS THAN 50 KILOGRAMS OF MARIJUANA; 18:2 AIDING AND ABETTING (6)	CBOP 60 months concurrent with state sentence; with special conditions; SPA $150.00; deft held in custody (6)

Offense Level (opening): 4

Termnated Counts:

NONE

Complaints:

NONE

Case Assigned to: Judge John E. Conway

MARIO PEREZ (3) defendant [term 10/06/93]	Roberto Albertorio, Esq. [term 10/06/93] [COR LD NTC cja] PO Box 90351 Albuquerque, NM 87199-0351 (505) 768-3917

Pending Counts:	Disposition
21:846 CONSPIRACY (1)	CBOP 87 months concurrent with each count and State sentence; with special conditions; SPA $150.00; deft held in custody (1)

18:924(c)(1) & 18:924(a)(2) POSSESSION OF A FIREARM IN USE OF A DRUG TRAFFICKING CRIME (2)	CBOP 87 months concurrent with each count and State sentence; with special conditions; SPA $150.00; deft held in custody (2)
21:841(a)(1) & 21:841(b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE LESS THAN 50 KILOGRAMS OF MARIJUANA; 18:2 AIDING AND ABETTING (6)	CBOP 87 months concurrent with each count and State sentence; with special conditions; SPA $150.00; deft held in custody (6)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

Case Assigned to: Judge John E. Conway

MIGUEL GONZALES (4) defendant [term 09/29/93]	Edward O. Bustamante, Esq. [term 09/29/93] [COR LD NTC cja] Padilla & Associates 1412 Lomas Blvd, NW Albuquerque, NM 87104 (505) 842-0392

Pending Counts:	Disposition
21:846 CONSPIRACY (1)	CBOP 60 months with 3 years supervised release and special conditions; deportation proceedings to be in progress prior to defts release; SPA $50.00; deft held in custody; three level reduction denied (1)
18:924(c)(1) & 18:924(a)(2) POSSESSION OF A FIREARM IN USE OF A DRUG TRAFFICKING CRIME (5)	CBOP 60 months with 3 years supervised release and special conditions; deportation proceedings to be in progress prior to defts release; SPA $50.00; deft held in custody; three level reduction denied (5)
21:841(a)(1) & 21:841(b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE LESS THAN 50 KILOGRAMS OF MARIJUANA; 18:2 AIDING AND ABETTING (6)	CBOP 60 months with 3 years supervised release and special conditions; deportation proceedings to be in progress prior to defts release; SPA $50.00; deft held in custody; three level reduction denied (6)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

U. S. Attorneys:

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RELEVANT DOCKET ENTRIES

5/8/92	1	INDICTMENT by USA Thomas L. English. Counts filed against Luis Leon (1) count(s) 1, 4, 6, Orlenis Hernandez-Diaz (2) count(s) 1, 3, 6, Mario Perez (3) count(s) 1, 2, 6, Miguel Gonzales (4) count(s) 1, 5, 6 (bl) [Entry date 08/17/92]
5/8/92	—	ARREST Warrant issued for Luis Leon (bl) [Entry date 08/17/92]
5/8/92	—	ARREST Warrant issued for Orlenis Hernandez-Diaz (bl) [Entry date 08/17/92]
5/8/92	—	ARREST Warrant issued for Mario Perez (bl) [Entry date 08/17/92]
5/8/92	—	ARREST Warrant issued for Miguel Gonzales (bl) [Entry date 08/17/92]
9/28/92	2	MOTION for Writ of Habeas Corpus Ad Prosequendum by USA as to Luis Leon (jg) [entry date 09/30/92]
9/28/92	4	MOTION for Writ of Habeas Corpus Ad Prosequendum by USA as to Orlenis Hernandez-Diaz (jg) [Entry date 09/30/92]
9/28/92	6	MOTION for Writ of Habeas Corpus Ad Prosequendum by USA as to Mario Perez (jg) [Entry date 09/30/92]
9/28/92	8	MOTION for Writ of Habeas Corpus Ad Prosequendum by USA as to Miguel Gonzales (jg) [Entry date 09/30/92]

9/29/92	3	ORDER by Judge John E. Conway granting motion for Writ of Habeas Corpus Ad Prosequendum by USA as to Luis Leon for arraignment on 10/29/92 at 9:00 A.M. [2-1] (cc: all counsel) (jg) [Entry date 09/30/92]
9/29/92	5	ORDER by Judge John E. Conway granting motion for Writ of Habeas Corpus Ad Prosequendum by USA as to Orlenis Hernandez-Diaz [4-1] (cc: all counsel) (jg) [Entry date 09/30/92]
9/29/92	7	ORDER by Judge John E. Conway granting motion for Writ of Habeas Corpus Ad Prosequendum by USA as to Mario Perez [6-1] (cc: all counsel) (jg) [Entry date 09/30/92]
9/29/92	9	ORDER by Judge John E. Conway granting motion for Writ of Habeas Corpus Ad Prosequendum by USA as to Miguel Gonzales [8-1] (cc: all counsel) (jg) [Entry date 09/30/92]
9/30/92	—	WRIT of Habeas Corpus Ad Prosequendum issued for defendant, Luis Leon for arraignment on 10/29/92 at 9:00 A.M. (jg) [Entry date 09/30/92] [Edit date 09/30/92]
9/30/92	—	WRIT of Habeas Corpus Ad Prosequendum issued for defendant Hernandez-Diaz for arraignment on 10/29/92 at 9:00 A.M. (jg) [Entry date 09/30/92] [Edit date 09/30/92]

9/30/92	—	WRIT of Habeas Corpus Ad Prosequendum issued for defendant Mario Perez for arraignment on 10/29/92 at 9:00 A.M. (jg) [Entry date 09/30/92] [Edit date 09/30/92]
9/30/92	—	WRIT Habeas Corpus Ad Proseguendum issued for defendant Miguel Gonzales for arraignment on 10/29/92 (jg) [Entry date 09/30/92]
10/27/92	10	CJA Form 20 Copy 4 (Appointment of Counsel) Angela Arellanes for defendant Qrlenis Hernandez-Diaz (jg) [Entry date 10/29/92] [Edit date 10/29/92]
10/27/92	11	CJA Form 20 Copy 4 (Appointment of Counsel) Alonzo J. Padilla for Luis Leon (jg) [Entry date 10/29/92]
10/27/92	12	CJA Form 20 Copy 4 (Appointment of Counsel) Edward O. Bustamante for defendant Miguel Gonzales (jg) [Entry date 10/29/92]
10/27/92	13	CJA Form 20 Copy 4 (Appointment of Counsel) Roberto Albertorio for defendant Mario Perez (jg) [Entry date 10/29/92]
10/29/92	14	CLERK'S MINUTES: before Magistrate William Deaton dft Orlenis Hernandez-Diaz arraigned; not guilty plea entered; Attorney present;, pretrial motions due 11/19/92, case assigned to Judge John E. Conway, first appearance of Orlenis Hernandez-Diaz on first appearance at arraignment; Defendant remained in custody; **INTER-

		PRETER REQUIRED**, #: 1045B#3 (jg) [Entry date 10/29/92]
10/29/92	15	CLERK'S MINUTES: before Magistrate William Deaton dft Mario Perez arraigned; not guilty plea entered; Attorney present;, pretrial motions due 11/19/92 , first appearance of Mario Perez at arraignment Defendant in custody; **INTERPRETER REQUIRED** 1045B#3 (jg) [Entry date 10/29/92]
10/29/92	16	CLERK'S MINUTES: before Magistrate William Deaton dft Miguel Gonzales arraigned; not guilty plea entered; Attorney present;, pretrial motions due 11/19/92, first appearance of Miguel Gonzales at arraignment; Defendant in custody; **INTERPRETER PRESENT** ;, #: 1045B3 (jg) [Entry date 10/29/92]
10/29/92	17	ORDER that counsel meet and confer and jointly prepare OHR by Magistrate William Deaton (cc: all counsel) (jg) [Entry date 10/29/92]
10/29/92	18	ORDER Re: Discovery by Magistrate William Deaton (cc: all counsel) (jg) [Entry date 10/29/92]
10/29/92	—	DEFENDANT Luis Leon arrested (jg) [Entry date 10/29/92]
10/29/92	19	MOTION for writ of HCAP by USA as to Luis Leon (jg) [Entry date 10/30/92]

11/3/92	20	ORDER by Judge John E. Conway granting motion for writ of HCAP by USA as to Luis Leon to appear for arraignment on 11/19/92 at 9:30 [19-1] (cc: all counsel) (pg) [Entry date 11/03/92]
11/3/92	—	WRIT of Habeas Corpus Ad Prosequendum as to Luis Leon to appear for arraignment on 11/19/92 at 9:30 am issued in triplicate to USM (pg) [Entry date 11/03/92]
11/18/92	21	MOTION by defendant Miguel Gonzales to dismiss indictment or in the alternative to compel enforcement of the petite policy (pg) [Entry date 11/19/92]
11/18/92	22	MOTION to extend time in which to file omnibus and other motions as deemed relevant to this case by defendant Mario Perez (pg) [Entry date 11/19/92]
11/19/92	23	CLERK'S MINUTES: before Magistrate William Deaton dft Luis Leon arraigned; not guilty plea entered as to Counts I and IV of Indictment; Attorney Alonzo Padilla present for deft Leon; Motions and OHR due by 12/9/92; Trial to be set at a later time; No Bond; deft in State Custody Tape #: 1050 B#2 (pg) [Entry date 11/20/92]
11/19/92	24	ORDER sua sponte; counsel to meet and prepare OHR by Magistrate William Deaton (cc: all counsel) (pg) [Entry date 11/20/92]

11/19/92	25	ORDER sua sponte re: Filing of Discovery Documents by Magistrate William Deaton (cc: all counsel) (pg) [Entry date 11/20/92]
11/19/92	26	MOTION to extend time to file motions until 11/25/92 by defendant Orlenis Hernandez-Diaz (pg) [Entry date 11/20/92]
11/20/92	27	ORDER granting motion to extend time in which to file omnibus and other motions as deemed relevant to this case defendant Mario Perez et al., [22-1] pre-trial motions due 12/9/92 (cc: all counsel) (pg) [Entry date 11/20/92]
11/23/92	28	ORDER by Judge John E. Conway granting motion to extend time to file motions until 11/25/92 by defendant Orlenis Hernandez-Diaz [26-1] (cc: all counsel) (bl) [Entry date 11/23/92]
11/25/92	29	OMNIBUS Hearing Report as to deft Miguel Gonzales by Judge John E. Conway (cc: all counsel) (pq) [Entry date 11/25/92]
11/25/92	30	MOTION by defendant Orlenis Hernandez-Diaz to dismiss indictment, or in the alternative to compel enforcement of the petite policy (pg) [Entry date 12/01/92]
12/1/92	31	OMNIBUS Hearing Report for Ornelis Hernandez-Diaz by Judge John E. Conway (cc: all counsel) (pg) [Entry date 12/01/92]

12/3/92	32	RESPONSE by plaintiff USA to motion by defendant Miguel Gonzales to dismiss indictment [21-1], motion to compel enforcement of the petite policy [21-2] (pg) [Entry date 12/04/92]
12/3/92	33	RESPONSE by plaintiff USA to motion by defendant Orlenis Hernandez-Diaz to dismiss indictment [30-1], motion to compel enforcement of the petite policy [30-2] (pg) [Entry date 12/04/92]
12/9/92	34	MOTION by defendant Mario Perez to dismiss indictment on grounds of double jeopardy particularly counts I, II and VI (pg) [Entry date 12/10/92]
12/9/92	35	MOTION to extend time to file motions until 12/16/92 by defendant Luis Leon (pg) [Entry date 12/10/92]
12/10/92	36	ORDER by Judge John E. Conway denying motion by defendant Miguel Gonzales to dismiss indictment [21-1] denying motion to compel enforcement of the petite policy [21-2] (cc: all counsel) (pg) [Entry date 12/10/92]
12/10/92	37	ORDER by Judge John E. Conway denying motion by defendant Orlenis Hernandez-Diaz to dismiss indictment [30-1] denying motion to compel enforcement of the petite policy [30-2] (cc: all counsel) (pg) [Entry date 12/10/92]
12/10/92	38	OMNIBUS Hearing Report for deft Luis Leon by Judge John E. Conway (cc: all counsel) (pg) [Entry date 12/10/92]

12/11/92	39	OMNIBUS Hearing Report as to Mario Perez by Judge John E. Conway (cc: all counsel) (pg) [Entry date 12/12/92]
12/11/92	40	ORDER by Judge John E. Conway granting motion to extend time to file motions until 12/16/92 by defendant Luis Leon [35-1] in-court hearing 12/16/92 (cc: all counsel) (pg) [Entry date 12/12/92]
12/16/92	41	RESPONSE by defendant Mario Perez to motion by defendant Mario Perez to dismiss indictment on grounds of double jeopardy particularly counts I, II and VI [34-1] (pg) [Entry date 12/17/92]
12/17/92	43	NOTICE of Hearing jury selection and jury trial set for 1/25/93 at 9:00 a.m., before Judge Conway in Albuq., NM (CLERK:dw) (cc: all counsel by dw) (pr) [Entry date 12/28/92]
12/18/92	42	ORDER by Judge John E. Conway denying motion by defendant Mario Perez to dismiss indictment on grounds of double jeopardy particularly counts I, II and VI [34-1] (cc: all counsel) (ls) [Entry date 12/18/92]
12/30/92	44	MOTION for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Mario Perez (pr) [Entry date 12/30/92]
12/30/92	45	MOTION for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Luis Leon (pr) [Entry date 12/30/92]
12/30/92	46	MOTION for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Orlenis Hernandez-Diaz (pr) [Entry date 12/30/92]

12/30/92	47	MOTION for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Miguel Gonzales (pr) [Entry date 12/30/92]
1/5/93	48	ORDER by Judge John E. Conway granting motion for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Orlenis Hernandez-Diaz for trial on 1/25/93 at 9:00 am [46-1] (cc: all counsel) (ddc) [Entry date 01/05/93]
1/5/93	—	WRIT of HCAP issued as to Orlenis Hernandez-Diaz (ddc) [Entry date 01/05/93]
1/5/93	49	ORDER by Judge John E. Conway granting motion for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Miguel Gonzales for trial on 1/25/93 at 9:00 am [47-1] (cc: all counsel) (ddc) [Entry date 01/05/93]
1/5/93	—	WRIT of HCAP issued as to Miguel Gonzales (ddc) [Entry date 01/05/93]
1/5/93	50	ORDER by Judge John E. Conway granting motion for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Luis Leon for trial on 1/25/93 at 9:00 am [45-1] (cc: all counsel) (ddc) [Entry date 01/05/93]
1/5/93	—	WRIT of HCAP issued as to Luis Leon (ddc) [Entry date 01/05/93]

1/5/93	51	ORDER by Judge John E. Conway granting motion for order for Writ of Habeas Corpus Ad Prosequendum by USA as to Perez for trial on 1/25/93 at 9:00 am [44-1] (cc: all counsel) (ddc) [Entry date 01/05/93]
1/5/93	—	WRIT of HCAP issued as to Mario Perez (ddc) [Entry date 01/05/93]
1/11/93	52	MOTION to continue the trial set on 1/25/93 by Luis Leon, Orlenis Hernandez-Diaz, Mario Perez, Miguel Gonzales (pg) [Entry date 01/12/93]
1/15/93	53	ORDER by Judge John E. Conway granting motion to continue the trial set on 1/25/93 by Luis Leon, Orlenis Hernandez-Diaz, Mario Perez, Miguel Gonzales [52-1] jury trial is continued pursuant to 18 USC SEc 3151 (h)(8)(A) and that such time between the entry of this order and the new trial setting as set forth in a future order shall be excluded for purposes of the speedy trial act (cc: all counsel) (pg) [Entry date 01/15/93]
1/20/93	54	ENHANCEMENT INFORMATION charging prior convictions by USA as to Mario Perez (bl) [Entry date 01/21/93]
1/28/93	55	NOTICE of jury selection/trial on 3/8/93 at 9:00 before Judge Conway (cc: all counsel) (pg) [Entry date 02/02/93]
2/9/93	62	ARREST Warrant returned executed as to Luis Leon 11/17/92 (pg) [Entry date 02/18/93]

2/12/93	56	MOTION to continue trial set for 3/8/93 by defts Luis Leon, Orlenis Hernandez-Diaz, Mario Perez, Miguel Gonzales (pg) [Entry date 02/16/93]
2/17/93	57	MOTION for order issuance of Writ of Habeas Corpus Ad Prosequendum by USA as to Miguel Gonzales (pg) [Entry date 02/18/93]
2/17/93	58	MOTION for order for issuance of Writ of Habeas Corpus Ad Prosequendum by USA as to Luis Leon (pg) [Entry date 02/18/93]
2/17/93	59	MOTION for order for issuance of Writ of Habeas Corpus Ad Prosequendum by USA as to Mario Perez (pg) [Entry date 02/18/93]
2/17/93	60	MOTION for order for issuance of Writ of Habeas Corpus Ad Prosequendum by USA as to Orlenis Hernandez-Diaz (pg) [Entry date 02/18/93]
2/18/93	61	CONTINUANCE per 18:3161 by Judge John E. Conway granting motion to continue trial set for 3/8/93 by defts Luis Leon, Orlenis Hernandez-Diaz, Mario Perez, Miguel Gonzales [56-1] (cc: all counsel) (pg) [Entry date 02/18/93]
2/19/93	63	ORDER by Judge John E. Conway granting motion for order for issuance of Writ of Habeas Corpus Ad Prosequendum as to Luis Leon for trial on 3/8/93 at 9:00 before Judge Conway [58-1] (cc: all counsel) (pg) [Entry date 02/19/93]

2/19/93	64	ORDER by Judge John E. Conway granting motion for order for issuance of Writ of Habeas Corpus Ad Prosequendum as to Mario Perez; for trial on 3/8/93 at 9:00 before Judge Conway [59-1] (cc: all counsel) (pg) [Entry date 02/19/93]
2/19/93	—	WRIT OF HABEAS CORPUS AD PROSEQUENDUM issued as to Mario Perez (pg) [Entry date 02/19/93]
2/19/93	—	WRIT of Habeas Corpus Ad Prosequendum issued as to Luis Leon (pg) [Entry date 02/19/93]
2/19/93	65	ORDER by Judge John E. Conway granting motion for order issuance of Writ of Habeas Corpus Ad Prosequendum by USA as to Miguel Gonzales; for trial on 3/8/93 at 9:00 before Judge Conway [57-1] (cc: all counsel) (pg) [Entry date 02/19/93]
2/19/93	—	WRIT of Habeas Corpus Ad Prosequendum issued as to Miguel Gonzales (pg) [Entry date 02/19/93]
2/19/93	66	ORDER by Judge John E. Conway granting motion for order for issuance of Writ of Habeas Corpus Ad Prosequendum by as to Orlenis Hernandez-Diaz; for trial on 3/8/93 at 9:00 before Judge Conway [60-1] (cc: all counsel) (pg) [Entry date 02/19/93]

2/19/93	—	WRIT of Habeas Corpus Ad Prosequendum issued as to Orlenis Hernandez-Diaz (pg) [Entry date 02/19/93]
3/2/93	68	REQUESTED JURY Instructions by USA (pr) [Entry date 03/03/93]
3/2/93	69	EXPARTE MOTION for order to compel the Clerk of the 2nd Judicial District Court to release trial exhibits by USA as to defts. Luis Leon, Orlenis Hernandez-Diaz, Mario Perez & Miguel Gonzales (pr) [Entry date 03/03/93]
3/3/93	67	EXPARTE ORDER that the Clerk of the Second Judicial District Court release the trial exhibits in State of NM v. Luis Leon, Cr-91-771, State of NM v. Miguel Gonzales, Cr-91-770, State of NM v. Orlenis Hernandez-Diaz, Cr-91-772 and State of NM v. Perez Cr-91-776 to Albuquerque Police Officer James Torres by 3/8/93; said exhibits will be returned to the custody of the Clerk of the Second Judicial District once they are no longer required by Judge John E. Conway (cc: all counsel) (pg) [Entry date 03/03/93]
3/9/93	70	NOTICE of jury selection/ trial on 5/3/93 at 9:00 before Judge Conway; Call of Calendar will be on 5/3/93 at 8:30; Jury Instructions and any motions in Limine are due to the court 5 working days prior to trial (cc: all counsel) (pg) [Entry date 03/11/93]

4/2/93	71	MOTION to compel government to obtain prior testimony of key witnesses by defendant Luis Leon (pg) [Entry date 04/05/93]
4/6/93	72	MOTION to compel government to obtain prior testimony of key witnesses by defendant Miguel Gonzales (pg) [Entry date 04/07/93]
4/13/93	73	RESPONSE by pltf USA to motion to compel government to obtain prior testimony of key witnesses by defendant Miguel Gonzales [72-1] [71-1] (pg) [Entry date 04/13/93]
4/13/93	75	MOTION to continue and vacate trial setting by USA as to Luis Leon, Orlenis Hernandez-Diaz, Mario Perez, Miguel Gonzales (pg) [Entry date 04/14/93]
4/14/93	74	ORDER by Judge John E. Conway denying deft Miguel Gonzales motion to compel government to obtain prior testimony of key witnesses by [72-1] (cc: all counsel) (pg) [Entry date 04/14/93]
4/16/93	76	ORDER by Judge John E. Conway granting motion to continue and vacate trial setting of 5/3/93 by USA as to Luis Leon, Orlenis Hernandez-Diaz, Mario Perez, Miguel Gonzales [75-1] jury trial vacated (cc: all counsel) (pg) [Entry date 04/16/93]
5/5/93	77	NOTICE of Hearing jury selection and trial on 6/14/93 at 9:00 am before Judge Conway in Albuquerque, NM CLERK: dw (cc: all counsel) (pg) [Entry date 05/05/93]

5/6/93	78	ORDER by Judge John E. Conway denying motion to compel Government to Obtain Prior Testimony of Key Witnesses by defendant Luis Leon [71-1] (cc: all counsel) (pg) [Entry date 05/07/93]
5/27/93	79	ARREST Warrant returned executed as to deft Mario Perez 10/27/92 (pg) [Entry date 05/28/93]
6/4/93	80	ARREST Warrant returned executed as to Orlenis Hernandez-Diaz 10/27/92 (pg) [Entry date 06/04/93]
6/4/93	81	ARREST Warrant returned executed as to Miguel Gonzales 10/28/92 (pg) [Entry date 06/04/93]
6/7/93	82	REQUESTED Voir Dire questions by defendant Luis Leon (pg) [Entry date 06/08/93]
6/7/93	83	REQUESTED JURY Instructions by defendant Luis Leon (pg) [Entry date 06/08/93]
6/7/93	84	MOTION in limine by defendant Luis Leon (pg) [Entry date 06/08/93]
6/7/93	85	MOTION in limine for an order barring the govt in voir dire etc., by defendant Miguel Gonzales (pg) [Entry date 06/08/93]
6/7/93	86	REQUESTED Voir Dire questions by defendant Orlenis Hernandez-Diaz (pg) [Entry date 06/08/93]
6/7/93	87	REQUESTED Jury Instructions by defendant Orlenis Hernandez-Diaz (pg) [Entry date 06/08/93]

6/7/93	88	PROPOSED JURY Instructions by defendant Miguel Gonzales (pg) [Entry date 06/08/93]
6/8/93	89	MOTION that the Court order the Clerk to issue a Writ of Habeas Corpus Ad Prosequendum as to deft Orlenis Hernandez-Diaz by USA as to Orlenis Hernandez-Diaz (pg) [Entry date 06/09/93]
6/8/93	90	ORDER by Chief Judge Juan G. Burciaga for Judge Conway granting motion that the Court order the Clerk issue a Writ of Habeas Corpus Ad Prosequendum as to deft Orlenis Hernandez-Diaz [89-1] (cc: all counsel) (pg) [Entry date 06/09/93] [Edit date 06/09/93]
6/8/93	—	WRIT of Habeas Corpus Ad Prosequendum issued as to deft Orlenis Hernandez-Diaz (pg) [Entry date 06/09/93]
6/8/93	91	MOTION that the Court order the Clerk to issue a Writ of Habeas Corpus Ad Prosequendum by USA as to Mario Perez (pg) [Entry date 06/09/93]
6/8/93	92	ORDER by Chief Judge Juan G. Burciaga by Judge Conway granting motion that the Court order the Clerk to issue a Writ of Habeas Corpus Ad Prosequendum as to Mario Perez [91-1] (cc: all counsel) (pg) [Entry date 06/09/93] [Edit date 06/09/93]
6/8/93	93	MOTION to continue trial set for 6/14/93 by defendant Mario Perez (pg) [Entry date 06/09/93]

6/8/93	94	MOTION in limine that the Court determine, whether certain evidence the government intends to introduce should be excluded by defendant Orlenis Hernandez-Diaz (pg) [Entry date 06/09/93]
6/9/93	—	WRIT of Habeas Corpus Ad Prosequendum issued as to deft Mario Perez (pg) [Entry date 06/09/93]
6/9/93	95	REQUESTED JURY Instructions by defendant Mario Perez (pg) [Entry date 06/09/93]
6/11/93	96	ORDER by Judge John E. Conway granting motion to continue trial set for 6/14/93 by defendant Mario Perez [93-1] trial set for 6/17/93 at 8:30 (cc: all counsel) (pg) [Entry date 06/11/93]
6/11/93	97	RESPONSE by plaintiff USA to motion in limine that the Court determine, whether certain evidence the government intends to introduce should be excluded by defendant Orlenis Hernandez-Diaz [94-1] (pg) [Entry date 06/14/93]
6/11/93	98	ENHANCEMENT INFORMATION charging prior convictions by USA as to Mario Perez (pg) [Entry date 06/14/93]
6/14/93	99	CLERK'S MINUTES: before Judge John E. Conway; June 14/93 trial began, preliminary instructions given to the jury panel , voir dire begins, Recess; June 15, 1993; Court in Session; Recess June 17, 1993; Court in session; Crt

		denies defts motion for mistrial; recess; June 18, 1993; Court in session; Jury verdict reached finding Luis Leon guilty (1) count(s) 1, 4, 6, finding Orlenis Hernandez-Diaz guilty (2) count(s) 3, 6, finding Mario Perez guilty (3) 1, 2, 6, finding Miguel Gonzales guilty (4) count(s) 1, 5, 6 exhibit and witness list attached C. Chapman (pg) [Entry date 06/22/93] [Edit date 06/28/93]
6/17/93	100	REQUESTED JURY Instructions by defendant Luis Leon (pg) [Entry date 06/22/93]
6/18/93	101	COURTS Instructions to the jury (pg) [Entry date 06/22/93]
6/18/93	102	NOTE FROM THE JURY re: verdict (pg) [Entry date 06/22/93]
6/18/93	103	VERDICT: guilty as to Counts I, II, VI for deft Orlenis Hernandez-Diaz (pg) [Entry date 06/22/93] [Edit date 06/28/93]
6/18/93	104	VERDICT: guilty as to Counts I, II, VI for deft Mario Perez (pg) [Entry date 06/22/93]
6/18/93	105	VERDICT: guilty as to Counts I, V and VI for deft Miguel Gonzales (pg) [Entry date 06/22/93]
6/18/93	106	VERDICT: guilty as to Counts I, IV, VI for deft Luis Leon (pg) [Entry date 06/22/93]

6/24/93	107	NOTICE of sentencing hearing on 9/8/93 at 1:15 pm before Judge Conway in Albuquerque, NM (CLERK:dw) (cc: all counsel) (pg) [Entry date 06/24/93]
8/2/93	108	MOTION by defendant Luis Leon to withdraw his attorney Alonzo Padilla (pg) [Entry date 08/03/93]
8/18/93	—	TRANSCRIPT of Proceedings of day three of jury trial held on 6/17/93 held before Judge Conway (pg) [Entry date 08/19/93]
8/18/93	109	ORDER by Judge John E. Conway denying Luis Leon's motion to withdraw his attorney Alonzo Padilla [108-1] (cc: all counsel) (pg) [Entry date 08/19/93]
8/30/93	110	OBJECTIONS to Presentence report and sentencing memorandum by defendant Miguel Gonzales (pg) [Entry date 08/31/93]
9/3/93	111	OBJECTIONS to pre-sentence report by defendant Luis Leon (pg) [Entry date 09/03/93]
9/3/93	112	OBJECTIONS to presentence report and sentencing memorandum by defendant Orlenis Hernandez-Diaz (pg) [Entry date 09/07/93]
9/7/93	113	MOTION to vacate the sentencing until after the deft has been sentenced by the Second Judicial District Court by USA as to Luis Leon (pg) [Entry date 09/08/93]

9/8/93	114	SENTENCING memorandum re Orlenis Hernandez-Diaz, Mario Perez, Miguel Gonzales by USA (pg) [Entry date 09/08/93]
9/8/93	115	OBJECTIONS by defendant Mario Perez to sentencing memorandum [114-1] (pg) [Entry date 09/08/93]
9/8/93	116	ORDER by Judge John E. Conway granting motion to vacate the sentencing until after the deft has been sentenced by the Second Judicial District Court [113-1] sentencing hearing set for 9/8/93 as to deft Leon is hereby vacated (cc: all counsel) (pg) [Entry date 09/08/93]
9/8/93	117	NOTICE of sentencing hearing set for 9/22/93 at 1:15 pm before Judge Conway, in Albuquerque, NM as to all defts (CLERK:lj)(cc: all counsel) (pg) [Entry date 09/09/93]
9/20/93	118	MOTION to vacate sentence set for 9/22/93 to 10/6/93 by deft Orlenis Hernandez-Diaz (pg) [Entry date 09/20/93]
9/21/93	119	ORDER by Judge John E. Conway granting motion to vacate sentence set for 9/22/93 [18-1] sentencing hearing reset for 10/6/93 at 1:15 pm (cc: all counsel) (pg) [Entry date 09/21/93]
9/23/93	120	RESPONSE by defendant Miguel Gonzales to sentencing memorandum [114-1] (pg) [Entry date 09/24/93]

9/29793	121	CLERK'S MINUTES: before Judge John E. Conway sentencing Miguel Gonzales (4) count(s) 1, 5, 6. CBOP 60 months 3 years supervised release and special conditions; deportation proceedings to be in progress prior to defts release; SPA $50.00; deft held in custody; three level reduction denied, terminating party(s) C/R: C. Chapman (pg) [Entry date 09/30/93]
9/30/93	122	MOTION for order to issue a writ of habeas corpus ad prosequendum for hearing on 10/6/93 before Judge Conway by USA as to Luis Leon (pg) [Entry date 10/04/93]
10/1/93	123	ORDER by Judge John E. Conway granting motion for order to issue a writ of habeas corpus ad prosequendum as to deft Leon for a hearing on 10/6/93 before Judge Conway [122-1] (cc: all counsel) (pg) [Entry date 10/04/93]
10/5/93	124	REPLY by defendant Orlenis Hernandez-Diaz to Government's sentencing memorandum [114-1] (pg) [Entry date 10/06/93]
10/6/93	125	CLERK'S MINUTES: before Judge John E. Conway sentencing Orlenis Hernandez-Diaz (2) count(s) 1, 3, 6 of the Indictment. CBOP 60 months concurrent with state sentence; with special conditions; SPA $150.00; deft held in custody C/R: F. Donica (pg) [Entry date 10/07/93]

10/6/93 126 CLERK'S MINUTES: before Judge John E. Conway sentencing Mario Perez (3) count(s) 1, 2, 6 of Indictment. CBOP 87 months concurrent with each count and State sentence; with special conditions; SPA $150.00; deft held in custody, party(s) Mario Perez C/R: F. Donica (pg) [Entry date 10/07/93]

10/6/93 127 CLERK'S MINUTES: before Judge John E. Conway sentencing Luis Leon (1) count(s) 1, 4, 6 of the Indictment. CBOP 60 months with State sentence; 3 years supervised release; with special conditions; SPA $150.00; deft held in custody, case terminated, terminate party(s) Luis Leon C/R: F. Donica (pg) [Entry date 10/07/93]

10/12/93 128 NOTICE of return executed Writ by taking into custody from Central NM Correctional Center Miguel Gonzales to USM on 10/28/93 (pg) [Entry date 10/13/93]

10/14/93 129 JUDGMENT by Judge John E. Conway as to deft Miguel Gonzales (distribution as required) (pg) [Entry date 10/14/93]

10/18/93 137 CJA 21 (Expert Services) payable to Dania Marquez in amount of $300 re: Luis Leon (jm) [Entry date 10/29/93]

10/19/93 130 JUDGMENT by Judge John E. Conway as to deft Orlenis Hernandez-Diaz (distribution as required) (pg) [Entry date 10/20/93]

10/19/93 131 JUDGMENT by Judge John E. Conway as to deft Luis Leon (distribution as required) (pg) [Entry date 10/20/93]

10/19/93 132 JUDGMENT by Judge John E. Conway as to deft Mario Perez (distribution as required) (pg) [Entry date 10/20/93]

10/25/93 133 NOTICE of Appeal to Circuit Court by defendant Orlenis Hernandez-Diaz [130-1]; Fees waived—Distribution as required. (pg) [Entry date 10/26/93]

10/26/93 134 AMENDED JUDGMENT in a Criminal Case by Judge John E. Conway as to Miguel Gonzales; deft found guilty as to Count I and Count VI of indictment; deft committed to custody of CBOP for 60 months each count, to run concurrently with State of New Mexico sentence, for which deft is currently confined; as to Count V, deft found guilty and committed to custody of CBOP for 60 months, to run consecutively to sentence imposed on Counts I and VI and consecutively with State of NM sentence, for which deft is currently confined; supervised release for a period of 3 years as to each Count I, V and VI, to run concurrently; SPA $50 as to each count, for a total of $150; no fine imposed; voluntary surrender not granted (distribution as required) (mls) [Entry date 10/27/93]

10/27/93 135 NOTICE OF APPEAL by defendant Luis Leon from Dist. Court judment filed 10/20/93 [131-1]; Fees not necessary—Distribution as required. (cc: all counsel) (pg) [Entry date 10/28/93]

10/28/93 136 NOTICE of Appeal to Circuit Court by defendant Miguel Gonzales to the Amended Judgment filed 10/26/93 [134-1] ; Fees not necessary—Distribution as required. (pg) [Entry date 10/28/93]

10/29/93 138 NOTICE of Appeal to Circuit Court by defendant Mario Perez from the Judgment filed 10/19/93 [132-1] ; Fees not necessary—Distribution as required. (pg) [Entry date 11/01/93]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, *Plaintiff*,

v.

LUIS LEON, ORLENIS HERNANDEZ-DIAZ, MARIO PEREZ, MIGUEL GONZALES, *Defendants*.

INDICTMENT

CRIMINAL NO. 92-236 21 U.S.C. § 846: Conspiracy; 18 U.S.C. § 924(c): Possession of a Firearm in Use of a Drug Trafficking Crime; 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(D): Possession with Intent to Distribute Less than 50 Kilograms of Marijuana; 18 U.S.C. § 2: Aiding and Abetting.

The Grand Jury charges:

COUNT I

From on or about the 22nd day of April, 1991, to on or about the 23rd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, and elsewhere, the defendants, LUIS LEON, ORLENIS HERNANDEZ-DIAZ, MARIO PEREZ, and MIGUEL GONZALES, did unlawfully, knowingly and intentionally combine, conspire, confederate, and agree together and with one another and with other persons whose names are known and unknown to the grand jury to commit offenses against the United States, to wit: violation of 21

U.S.C. § 841(a)(1) and § 841(b)(1)(D), that is possession with intent to distribute less than 50 kilograms of marijuana, a schedule I controlled substance.

In violation of 21 U.S.C. § 846 and 18 U.S.C. § 2.

COUNT II

On or about the 22nd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendant, MARIO PEREZ, knowingly used and carried a firearm, to wit: a Browning, High Power, 9mm pistol, serial number 245RR64607, during and in relation to a drug trafficking crime for which defendant may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute less than 50 kilograms of Marijuana, contrary to 21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

In violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 924(a)(2) and 18 U.S.C. § 2.

COUNT III

On or about the 22nd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendant, ORLENIS HERNANDEZ-DIAZ, knowingly used and carried a firearm, to wit: a Llama, 9mm caliber pistol, serial number 946130, during and in relation to a drug trafficking crime for which defendant may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute less than 50 kilograms of marijuana, contrary to 21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

In violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 924(a)(2) and 18 U.S.C.§ 2.

COUNT IV

On or about the 22nd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendant, LUIS LEON, knowingly used and carried a firearm, to wit: a Raven, model MP-25, .25ACP caliber pistol, serial number 1730142, during and in relation to a drug trafficking crime for which defendant may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute less than 50 kilograms of marijuana, contrary to 21 U.S.C. § 846 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

In violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 924(a)(2) and 18 U.S.C. § 2.

COUNT V

On or about the 22nd day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendant, MIGUEL GONZALES, knowingly used and carried a firearm, to wit: a Llama, 9mm caliber pistol, serial number 946130, during and in relation to a drug trafficking crime for which defendant may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute less than 50 kilograms of marijuana, contrary to 21 U.S.C.§ 846 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).

In violation of 18 U.S.C. § 924(c)(1), 18 U.S.C. § 924(a)(2) and 18 U.S.C. § 2.

COUNT VI

On or about the 23th day of April, 1991, in Bernalillo County, in the State and District of New Mexico, the defendants, LUIS LEON, ORLENIS HERNANDEZ-

DIAZ, MARIO PEREZ, and MIGUEL GONZALES, did unlawfully, knowingly and intentionally possess with intent to distribute less than 50 kilograms of Marijuana, a Schedule I controlled substance.

In violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(D).

A TRUE BILL:

FOREPERSON OF THE GRAND JURY

DON J. SVET
United States Attorney

IN THE UNITED STATES FEDERAL COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MIGUEL GONZALES, ET AL., *Defendant.*

MOTION TO DISMISS INDICTMENT OR IN THE ALTERNATIVE, TO COMPEL ENFORCEMENT OF THE PETITE POLICY

Miguel Gonzales through counsel Ed Bustamante, and pursuant to the Fifth amendment of the United States Constitution and Deparment of Justice Manual 9-2.142, the *Petite* policy, moves this Court dismiss the indictment in this case or, compel the government to implement the *Petite* policy and dismiss the indictment in this case. As grounds for his motion, defendant states:

1. Defendant is charged in federal court with conspiracy to possess less than fifty (50) kilograms of marijuana, possessing a gun while committing a drug offense, and possession of less than fifty (50) kilograms of marijuana. Each offense grows out of a single episode of alleged criminal conduct allegedly occurring April 22nd and 23rd 1991. The indictment was filed May 8, 1992.

2. On February 11, 1992, a jury in state court in the Second Judicial District, Bernalillo County, convicted Miguel Gonzales of Armed Robbery of Marijuana, with a

one-year firearm enhancement, Conspiracy to Commit Armed Robbery, with a one year firearm enhancement, and Conspiracy to Possess Marijuana (Eight ounces or more). The above convictions involved the identical firearms and the identical episode of alleged criminal conduct charged in this federal indictment. The State conviction occurred three (3) months before the federal grand jury indicted in this cause. The State court sentenced defendant to nineteen and one half years, with six and one half years suspended.

3. The government has not received authorization from the Attorney General pursuant to Department of Justice Manual 9-2.142 to initiate or continue the federal prosecution of defendant. The Department of Justice states, the policy "is intended to regulate prosecutorial discretion in order to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from unfairness associated with multiple prosecutions and multiple unfairness for substantially the same act or acts." *See* DOJ Manual 9-2.142. *Rinaldi v. United States*, 434 U.S. 22, 27 (1977); *Petite v. United States*, 361 U.S. 529 (1960).

In support of this motion, defendant cites the following argument and authority:

In a *per curiam* opinion in *Petite v. U.S.*, 361 U.S. 529 (1960), the Supreme Court, without reaching the merits on the question of Double Jeopardy, remanded the case with directions the district court follow the Solictor General's motion to vacate the indictment against the defendant on the grounds he was already convicted of the same offense in state court as charged in federal court. The Solicitor General had moved to dismiss the charge based on government policy, "dictated by considerations both of fairness to defendants and to efficient

and orderly law enforcement" to forego multiple prosecutions arising out of the same offense for which a defendant had been convicted in state court. *Id.* at 530.

Although the Justice Department's "*Petite*" policy is self-policing, a defendant can raise the claim of a violation of the policy in federal court. *See, Rinaldi v. U.S.*, 434 U.S. 22, 23 (1977). In its *per curiam* opinion in *Rinaldi*, the Supreme Court noted that the *Petite* policy was generated as a response to the Court's concern about the legitimacy of dual state and federal prosecutions for the same offense. It noted that "although not constitutionally mandated, this Executive policy serves to protect interests which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause." *Id.* at 29.

The policy, "efficient utilization of Justice Department resources" is not served by successive prosecutions of a defendant already convicted and sentenced to prison on state charges for the identical conduct in the federal indictment. A total sentence of nineteen and one half (19 1/2) years satisfies the ends of justice for the criminal conduct whether the result of state of federal prosecution simultaneously, it is unfair to subject defendant to multiple prosecutions "for substantially the same act." DOJ Manual 9-2.142.

The *Petite*, policy requires the government receive prior authorization before pursuing multiple prosecutions for the same conduct already punished in state court. The government has violated the spirit and letter of DOJ Manual 9-2.142. Defendant requests this Court dismiss the indictment or compel the government to implement the *Petite*, policy and dismiss the indictment.

In compliance with local rules, counsel states that the government opposes this motion.

Respectfully submitted,

EDWARD O. BUSTAMANTE
1412 LOMAS BLVD., NW
ALBUQUERQUE, NM 87104
(505) 842-0392

This certifies a copy of this Motion was sent to the U.S. Attorney this 18th day of November 1992.

EDWARD O. BUSTAMANTE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendant*.

MOTION TO DISMISS INDICTMENT OR IN THE ALTERNATIVE, TO COMPEL ENFORCEMENT OF THE PETITE POLICY

COMES NOW the Defendant and pursuant to the Fifth Amendment of the United States Constitution and Department of Justice Manual 9-2.142, moves this Court to dismiss the indictment in this case, or compel the Government implement the *Petite* policy, and as grounds thereof states as follows:

1. The Defendant was indicted on May 8, 1992, for conspiracy to possess less than 50 kilograms of marijuana, possession with intent to distribute less than 50 kilograms of marijuana, and possession of a firearm during or in relation to a drug trafficking crime. The alleged facts on which the offenses are based occurred April 22, and April 23, 1991.

2. Defendant Hernandez-Diaz was convicted on February 11, 1992, pursuant to a jury verdict of guilty in State Court in the Second Judicial District Court, Bernalillo County for the offenses of Armed Robbery, with a 1 year firearm enhancement, Attempt to Commit a Felony, firearm enhancement, Conspiracy to Commit

Armed Robbery, firearm enhancement, False Imprisonment, firearm enhancement, and Conspiracy to Commit Possession of Marijuana over eight ounces. The Defendant received a sentence of 22 years of which 7.5 years were suspended which left a balance of 14.5 years to be served. The convictions in State Court involved the identical set of facts, firearms and marijuana which served the basis for the indictment in Federal Court.

3. The Government has not complied with its own policies and procedures pursuant to DOJ manual 9-2.142, commonly referred as the *Petite* policy. The section states:

No Federal case should be tried when there has been a State prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling federal interests for such prosecution. No such recommendation may be approved by Assistant Attorney General without having it first brought to the attention of the Attorney General.

4. The overriding purpose of the *Petite* policy is to protect the individual from any unfairness associated with needless multiple prosecution. *Rinaldi vs. United States*, 434 U.S. 22, (1977). A secondary purpose of the policy is to preserve judicial and prosecutorial resources expended in needless prosecution. Interests protected by the Double Jeopardy Clause, but for the "dual sovereignty" principle, are recognized. There is a great potential for abuse in duplicate prosecutions. However, the Government may elect to proceed when necessary to advance to compelling interests in federal law enforcement. *Supra.*

5. The Defendant received a 22 year sentence. No societal interest would be vindicated by punishing further a Defendant who has already been convicted and received a substantial sentence in State Court based on the identical conduct which gave rise to the offenses indicted in Federal Court.

6. The Government to date has not received authorization from the Attorney General to pursue an indictment in Federal Court for the same conduct already punished in State Court. The Government has violated the spirt and letter of DOJ Manual 9-2.142.

7. Assistant United States Attorney, Tom English opposes this Motion.

WHEREFORE the Defendant prays that the Court dismiss the indictment or compel the Government to enforce the *Petite* policy.

Respectfully submitted,

/s/ ANGELA ARELLANES

Angela Arellanes
Attorney for Defendant
320 Gold SW-Suite 916
Albuquerque, NM 87102
(505) 247-2417

I hereby certify that a
true copy of the foregoing
pleading was mailed to counsel
of record this 25 day of
November, 1992.

Angela Arellanes

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236 JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

LUIS LEON, ORLENIS HERNANDEZ-DIAZ, MARIO PEREZ, MIGUEL GONZALES, *Defendants*.

MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY

Defendant, MARIO PEREZ, through counsel, ROBERTO ALBERTORIO, moves this Court to Dismiss the Indictment above referenced particularly Counts I, II, and VI. As grounds for this Motion, Defendant respectfully submits as follows:

FACTS

An indictment was filed with the United States District Court for the District of New Mexico on May 8, 1992 charging this Defendant, et al., with violation of 21 U.S.C. 846: Conspiracy; 18 U.S.C. 924(c); Possession of a Firearm in Use of a Drug Trafficking Crime; 21 U.S.C. 841(a)(l) and 21 U.S.C. 841(b)(l)(D): Possession with Intent to Distribute Less than 50 Kilograms of Marijuana; 18 U.S.C. 2: Aiding and Abetting. The Defendant was arraigned on Thursday, October 29, 1992 at 9:30 a.m. before the Hon: Magistrate Deaton.

The Defendant, MARIO PEREZ was subject to New Mexico State prosecution in the Second Judicial District

Court, County of Bernalillo No CR-91-0776, pursuant to an Indictment wherein he was found guilty after trial and sentenced to the following state offenses: Armed Robbery (Firearm Enhancement), a felony offense occurring on or about April 23, 1991; Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991 as contained in Count II, of the state indictment; Armed Robbery of Marijuana (Firearm Enhancement) as contained in Count 3 of the state indictment; Conspiracy to Commit Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count IV, of the state indictment; False Imprisonment (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count V, of the state indictment; Conspiracy to Commit Possession of Marijuana (eight ounces or more) a felony offense occurring on or about April 23, 1991, as contained in Count VI, of the state indictment as amended in trial, and Eluding an Officer, a misdemeanor offense occurring on or about April 23, 1991, as contained in Count 7 of the state indictment as amended at trial.

The Defendant was found and adjudged guilty and convicted and sentenced for the term of nine (9) years as to *each* Armed Robbery; three (3) years as to Attempt to Commit a Felony to wit: Armed Robbery of Marijuana; three (3) years as to Conspiracy to Commit Armed Robbery; one and one-half (1 1/2) years as to Conspiracy to Commit Possession of Marijuana; and one and one-half (1 1/2) years as to False Imprisonment; and three-hundred sixty-four (364) days as to Eluding an Officer. All sentences to run *consecutive* to one another. In addition, all of the offenses, excluding Conspiracy to Commit Possession of Marijuana and Eluding an Officer, were *each* enhanced by 1 year pursuant to Section 31-18-16 NMSA, 1978 for a total sentence of (32) years and three

hundred and sixty-four days of which (15) years and three hundred and sixty-four days were suspended for an actual sentence of seventeen (17) years. The Defendant was also ordered to be placed on supervised probation for five (5) years following release from custody.

The matter before the Federal District Court pursuant to this Indictment is based on the same factual occurrences as above described. Specifically the Defendant is charged with the federal offenses to have occurred on or about the 22 of April 1991, to on or about the 23rd day of April, 1991.

There is no evidence that the Defendant engaged in any criminal activity beyond the day described in both the state and federal indictments.

ANALYSIS

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Clause provides three separate protections for criminal defendant: against reprosecution for the same offense after an acquittal; against prosecution for the same offense after a conviction; and against multiple punishments for the same offense. In Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306-07 (1984)(dictum), the Supreme Court articulated several policy justifications for the protections conferred by the Double Jeopardy Clause. First, the prohibition against reprosecution after acquittal or conviction "ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." Ohio v. Johnson, 467 U.S. 493, 498-99 (1984)(dictum). Second, the prohibition against retrial after conviction prevents a defendant from being subject to the multiple punishments for the same offense. Lydon, 466 U.S. at 307. Third, the protection against cumulative punishments "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." Johnson, 467 U.S. at 499 (dictum).

The Federal Indictment is a reprosecution for the offenses for which the Defendant has already been tried convicted and sentenced. The Government's additional prosecution of these offenses will serve only to enhance sentences to which the Defendant is already in custody. It is anticipated that if this matter goes to trial, the Government will call the same witnesses to testify to the identical facts established in the State prosecution. The defendant submits that the file through discovery contains no additional information or evidence which were not already contained in the original prosecution.

The Double Jeopardy challenge is immediately appealable because Double Jeopardy Clause protects against even "risk" of conviction. Abney v. U.S., 431 U.S. 651, 660-62 (1977). Double Jeopardy Clause generally requires that all charges against defendant growing out of a "single criminal act, occurrence, transaction, or episode be prosecuted in one proceeding" (quoting Ashe v. Swenson, 397 U.S. 436, 453-54 (1970). The Defendant respectfully submits that there is no dispute that the single criminal act, occurrence, transaction and episodes were one act covering the same period of time and participants which were part of the original state indictment and conviction. In Blockburger v. United States 284 U.S. 299 (1932) the court established that a single act could be prosecuted and punished under different statutory provisions if each required proof of an element that the other did not. However, in Grady v. Corbin, 110

S. Ct. 2084 (1990), the Supreme Court significantly altered the double jeopardy analysis for multiple prosecutions. Because of a concern that Blockburger did not adequately protect defendants from the "burdens of multiple trials," Id at 2093, the Court held that the Blockburger test is only the first step in a two-part analysis. If Blockburger bars a subsequent prosecution, the inquiry ends. If, however, a subsequent prosecution survives Blockburger, it may still be barred if, in order to establish an essential element of the offense charged, the prosecution will prove conduct that constituted an offense for which the defendant was already (prosecuted). [*sic*] In applying the Grady test, courts focus on whether the conduct previously prosecuted is being used to establish an "essential element" in the second prosecution. Courts also consider whether the conduct in both prosecutions involves the same persons, locations and times. In the case at bar this is indisputable.

In Jeffers v. United States, 432 U.S. 137 (1977)(plurality opinion), the Court determined that Congress did not intend to permit cumulative punishments for engaging in a continuing criminal enterprise to violate the drug laws and for conspiring to distribute narcotics. The facts in this case and the subsequent federal indictment leave little doubt that the Defendant, if convicted under the federal indictment will be subjected to cumulative punishments after having already been sentenced to seventeen (17) years in the State District Court for the same offenses. Furthermore, as above noted, in all but two counts of the state indictment and convictions, the Defendant's sentence was enhanced by one year because of the use of a firearm. The federal indictment mirrors the state charges pursuant to 18 U.S.C. 924(c) Possession of a Firearm in the Use of a Drug Trafficking Crime which will expose the Defendant to an additional five year (5) sentencing to run consecutively to any

other potential sentence if issued by the New Mexico District Court.

COLLATERAL ESTOPPEL

The Double Jeopardy Clause embodies the corollary doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436 (1970). Collateral Estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit". Id at 443. Collateral estoppel may bar retrial in cases in which the Double Jeopardy Clause would not. Ashe, Supra. at 446. Two conditions must be satisfied for the doctrine to apply. First, the second prosecution must involve the same parties as the first trial. Standefer v. U.S., 447 U.S. 10, 13-14,25 (1980). Second, the issue the defendant seeks to foreclose must have been previously determined by a valid and final judgment. A review of the state prosecution, jury findings and subsequent sentencing leaves little doubt that the jury's verdict determined the issues which are also raised in the federal indictment and the defendant respectfully seeks to foreclose. The Defendant in this matter has been convicted pursuant to the commission of one act or episode and if tried and convicted pursuant to this federal indictment he would be twice punished for the same offenses.

DUAL SOVEREIGNTY

Rinaldi v. U.S., 434 U.S. 22, 28 (1977), held that federal and state governments may bring successive prosecutions for offenses arising from the same criminal act. However, dual sovereignty is subject to two limitations. First, federal authorities may not manipulate a state system to achieve the equivalent of a second federal prosecution, and the circuits have likewise held that

state authorities may not manipulate the federal system. Barkus v. U.S. 359 U.S. at 123-24.

The issues at bar are indistinguisable from the issues before the State District Court and therefore reprosecution is warranted.

WHEREFORE, Defendant respectfully request this Court to dismiss the indictment upon a finding that it is precluded pursuant to the provisions above described.

Respectfully submitted

ROBERTO ALBERTORIO
Attorney for Defendant Perez
P.O. BOX 90351
Albuquerque, New Mexico
87199
505-768-3917

I certify that a true copy
of this Motion has been filed
with the U.S. Attorney's Office
this 9th day of December, 1992

ROBERTO ALBERTORIO

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MIGUEL GONZALES, ET AL., *Defendant*.

[Filed Dec. 3, 1992]

UNITED STATES' RESPONSE TO MOTION TO DISMISS INDICTMENT OR, IN THE ALTERNATIVE, TO COMPEL ENFORCEMENT OF THE PETITE POLICY FILED ON NOVEMBER 18, 1992

Comes now the United States of America by and through Don J. Svet, United States Attorney for the District of New Mexico and Thomas L. English, Assistant U.S. Attorney for said District, and responds to Defendant's Motion to Dismiss Indictment as follows:

Defendant wrongly cites to *Rinaldi v. United States*, 434 U.S. 22 (1977) to support his claim that, a defendant can raise the claim of a violation of [the *Petite*] policy in federal court. *Rinaldi* does not confer a right on the defendant pursuant to the federal policy. *Rinaldi* merely holds that, [t]he defendant...should receive the benefit of the policy whenever its application is *urged by the government*. *Id.* at 31 (emphasis added).

The United States Attorney's Manual expressly states the following:

> The dual prosecution and successive federal prosecution policy statements are set forth solely for

> the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

United States Attorney's Manual, §9-2.142(b)(3).

The Tenth Circuit, as well as all circuits which have addressed this issue, has held that a defendant cannot invoke the Department of Justice's *Petite* policy as a bar to federal prosecution. *United States v. Thompson*, 579 F.2d 1184 (10th Cir. 1978). And see, *United States v. Howard*, 590 F.2d 564 (4th Cir. 1979); *United States v. Nelligan*, 573 F.2d 251 (5th Cir. 1978); *United States v. Frederick*, 583 F.2d 273 (6th Cir. 1978); *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969); *United States v. Wallace*, 578 F.2d 735 (8th Cir. 1978); *United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979).

Moreover, the United States Supreme Court has ruled that Department of Justice policies governing its internal operations do not create rights which may be enforced by defendants. *United States v. Caceres*, 440 U.S. 741 (1979). Because there is no constitutional bar to Troup's prosecution, his motion must be denied. See, *Goode v. McCune*, 543 F.2d 751, 753 (10th Cir. 1976)(punishment by two sovereigns not constitutionally barred).

Respectfully submitted,

DON J. SVET
United States Attorney

/s/ THOMAS L. ENGLISH

THOMAS L. ENGLISH
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341

I HEREBY CERTIFY that a true copy
of the foregoing pleading was mailed
to opposing counsel of record,
Edward Bustamante, 1412 Lomas Blvd. N.W.,
Albuquerque, New Mexico 87104,
this 3rd day of December, 1992.

THOMAS L. ENGLISH

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendant*.

[Filed Dec. 3, 1992]

UNITED STATES' RESPONSE TO MOTION TO DISMISS INDICTMENT OR, IN THE ALTERNATIVE, TO COMPEL ENFORCEMENT OF THE PETITE POLICY FILED ON NOVEMBER 25, 1992

Comes now the United States of America by and through Don J. Svet, United States Attorney for the District of New Mexico and Thomas L. English, Assistant U.S. Attorney for said District, and responds to Defendant's Motion to Dismiss Indictment as follows:

Defendant wrongly cites to *Rinaldi v. United States*, 434 U.S. 22 (1977) to support his claim that, a defendant can raise the claim of a violation of [the *Petite*] policy in federal court. *Rinaldi* does not confer a right on the defendant pursuant to the federal policy. *Rinaldi* merely holds that, [t]he defendant. . .should receive the benefit of the policy whenever its application is *urged by the government. Id.* at 31 (emphasis added).

The United States Attorney's Manual expressly states the following:

> The dual prosecution and successive federal prosecution policy statements are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

United States Attorney's Manual, §9-2.142(b)(3).

The Tenth Circuit, as well as all circuits which have addressed this issue, has held that a defendant cannot invoke the Department of Justice's *Petite* policy as a bar to federal prosecution. *United States v. Thompson*, 579 F.2d 1184 (10th Cir. 1978). And see, *United States v. Howard*, 590 F.2d 564 (4th Cir. 1979); *United States v. Nelligan*, 573 F.2d 251 (5th Cir. 1978); *United States v. Frederick*, 583 F.2d 273 (6th Cir. 1978); *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969); *United States v. Wallace*, 578 F.2d 735 (8th Cir. 1978); *United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979).

Moreover, the United States Supreme Court has ruled that Department of Justice policies governing its internal operations do not create rights which may be enforced by defendants. *United States v. Caceres*, 440 U.S. 741 (1979). Because there is no constitutional bar to Troup's prosecution, his motion must be denied. See, *Goode v. McCune*, 543 F.2d 751, 753 (10th Cir. 1976)(punishment by two sovereigns not constitutionally barred).

Respectfully submitted,

DON J. SVET
United States Attorney

/s/ THOMAS L. ENGLISH

THOMAS L. ENGLISH
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341

I HEREBY CERTIFY that a true copy
of the foregoing pleading was mailed
to opposing counsel of record,
Angela Arellanes, 320 Gold S.W., Suite 916,
Albuquerque, New Mexico 87102,
this 3rd day of December, 1992.

THOMAS L. ENGLISH
Assistant U.S. Attorney

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARIO PEREZ, *Defendant*.

UNITED STATES' RESPONSE TO MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY FILED ON DECEMBER 9, 1992

Comes now the United States of America by and through Don J. Svet, United States Attorney for the District of New Mexico and Thomas L. English, Assistant U.S. Attorney for said District, and responds to Defendant's Motion to Dismiss Indictment as follows:

Defendant properly cites to *Rinaldi v. United States*, 434 U.S. 22 (1977) for the proposition that successive state and federal prosecutions are permissable. As such, his reliance on double jeopardy and collateral estoppel is misplaced. In the present case the issue of successive prosecution involves seperate soverns and different parties. Defendant's claim against successive prosecution is properly addressed by the federal Petite Policy. This issue is addressed in *Rinaldi* which does not confer a right on the defendant pursuant to the federal policy. *Rinaldi* merely holds that, [t]he defendant...should receive the benefit of the policy whenever its application is *urged by the government. Id.* at 31 (emphasis added).

The United States Attorney's Manual expressly states the following:

> The dual prosecution and successive federal prosecution policy statements are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

United States Attorney's Manual, §9-2.142(b)(3).

The Tenth Circuit, as well as all circuits which have addressed this issue, has held that a defendant cannot invoke the Department of Justice's *Petite* policy as a bar to federal prosecution. *United States v. Thompson*, 579 F.2d 1184 (10th Cir. 1978). And see, *United States v. Howard*, 590 F.2d 564 (4th Cir. 1979); *United States v. Nelligan*, 573 F.2d 251 (5th Cir. 1978); *United States v. Frederick*, 583 F.2d 273 (6th Cir. 1978); *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969); *United States v. Wallace*, 578 F.2d 735 (8th Cir. 1978); *United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979).

Moreover, the United States Supreme Court has ruled that Department of Justice policies governing its internal operations do not create rights which may be enforced by defendants. *United States v. Caceres*, 440 U.S. 741 (1979). Because there is no constitutional bar to defendant's prosecution, his motion must be denied. See, *Goode v. McCune*, 543 F.2d 751, 753 (10th Cir. 1976) (punishment by two sovereigns not constitutionally barred).

Additionally, the Court has denied the co-defendants' Motion to Dismiss or in the Alternative, to Compel Enforcement of the Petite Policy in an Order dated December 4, 1992.

Respectfully submitted,

DON J. SVET
United States Attorney

/s/ THOMAS L. ENGLISH

THOMAS L. ENGLISH
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341

I HEREBY CERTIFY that a true copy
of the foregoing pleading was mailed
to opposing counsel of record,
Roberto Albertorio, P.O. Box 90351,
Albuquerque, New Mexico 87199,
this 16th day of December, 1992.

/s/ THOMAS L. ENGLISH

THOMAS L. ENGLISH
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MIGUEL GONZALES, *Defendant*.

[Filed Dec. 10, 1992]

ORDER

THIS MATTER comes on for consideration of defendant's Motion to Dismiss indictment or in the Alternative, to Compel Enforcement of the *Petite* Policy, filed November 25, 1992. The Court, having reviewed the motion and the memoranda, and being otherwise fully advised in the premises, finds that the motion is not well-taken and will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss Indictment be, and hereby is, denied.

DATED December 4, 1992.

/s/ JOHN E. CONWAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendant*.

[Filed Dec. 10, 1992]

ORDER

THIS MATTER comes on for consideration of defendant's Motion to Dismiss indictment or in the Alternative, to Compel Enforcement of the *Petite* Policy, filed November 25, 1992. The Court, having reviewed the motion and the memoranda, and being otherwise fully advised in the premises, finds that the motion is not well-taken and will be denied.

Wherefore.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss Indictment be, and hereby is, denied.

DATED December 4, 1992.

/s/ JOHN E. CONWAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MARIO PEREZ, *Defendant.*

[Filed Dec. 18, 1992]

ORDER

THIS MATTER comes on for consideration of defendant's Motion to Dismiss on Grounds of Double Jeopardy, filed December 9, 1992. The Court, having reviewed the motion and the memoranda, and being otherwise fully advised in the premises, finds that the motion is not well-taken and will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss on Grounds of Double Jeopardy be, and hereby is, denied.

DATED December 17, 1992.

/s/ JOHN E. CONWAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICTCOURT
FOR THE DISTRICT OF NEW MEXICO

No. CR92-236-JC 004

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MIGUEL GONZALES, ET AL., *Defendant.*

OBJECTIONS TO THE PRESENTENCE REPORT AND SENTENCING MEMORANDUM

Miguel Gonzales through counsel Edward Bustamante, presents Objections to the Presentence Report prepared by Federal Probation and Sentencing Memorandum requesting downward departure.

OBJECTIONS TO THE PRESENTENCE REPORT

Miguel Gonzales was found guilty after a jury trial of the offenses Conspiracy to Possess With Intent to Distribute Less than 50 Kilograms of Marijuana in violation of 21 U.S.C. §846, Carry or Use of a Firearm During or in Relation to a Drug Trafficking Crime in violation of 18 U.S.C. §924(a)(1), and Possession With Intent to Distribute Less Than 50 Kilograms of Marijuna, in violation of 21 U.S.C. §841(a)(1).

Miguel Gonzales first objects to the factual inaccuracy in Mr. Gonzales' custodial status denying him jail credit for these offenses. Mr. Gonzales has been federal custody since October 28, 1992. A phone call to the United

States Marshall confirms his custodial status. Mr. Gonzales is entitled to jail credit from October 28, 1992 to present. Federal Sentencing Guideline Section 5G1.3(b) addressed below in this memorandum, supports Defendant's position he should be given credit for his time in federal custody.

Miguel Gonzales next objects to the factual assumption of paragraph fourteen (14) of the report under the heading *The Offense Conduct*. No evidence was produced at trial that Miguel Gonzales was in the apartment when Officer Torres was confronted by the co-defendants. No evidence was produced at trial Miguel Gonzales was seen entering the apartment immediately before or after Detective Torres was confronted by the co-defendants. Detective Torres was always in the best position to state who was in the apartment, and he so testified at trial. Officer Torres never stated Miguel Gonzales was in the apartment prior to his being bound and gagged. Paragraph fourteen's (14) assertion Miguel Gonzales left the apartment is an assumption unsupported by the evidence at trial.

Miguel Gonzales next objects to Paragraph twenty three (23) of the Presentence Report under the heading *Offense Level Computation*. The paragraph refers to applicable Victim Related Adjustments, §3A1.2.(b), under the Federal Sentencing Guidelines. The pre-sentence writer states a three level increase is warranted because Miguel Gonzales knew or should have known Officer Torres and Officer Gloria were police officers who were acting undercover before they were assaulted, and Miguel Gonzales knowing, or having reason to know the undercover agents were police officers disregarded this actual or supposed knowledge and intentionally continued his actions against police officers.

The facts of this case, and the justification given by the probation office do not support a three (3) level increase under the Federal Guidelines. Paragraph 23 justifies the increase by stating that prior to the defendants confronting Officers Gloria and Torres, the detectives were asked if they were police officers as several unmarked police units were seen in the area before the drug transaction took place.

The justification is nonsensical and misleading. If the units were unmarked there would be no suspicion the undercover agents were police. No evidence exists Miguel Gonzales ever was present, or asked any undercover officer if he was in fact a policeman. The presentence writer picks a portion of the trial when Detective Torres and Luis Leon are together in a vehicle with no other police officer or defendant present. Luis Leon asks Detective Torres if he is a police officer. Detective Torres denies being an officer, keeps his undercover status and tells Luis Leon he "feels good about the deal." Mr. Leon is apparently convinced everything is fine because the drug transaction, through the eyes of police, continues. No evidence exists Mr. Leon relayed this conversation to Miguel Gonzales. No evidence exists Mr. Gonzales was present when Detective Torres was confronted by the co-defendants. The police in this case were conducting a reverse sting operation and posed as drug sellers. Their undercover status was never revealed until Detective Torres informed the co-defendants he was a police officer. Miguel Gonzales was not present during those conversations. Detective Gloria testifed Miguel Gonzales threatened him with a gun. He did not testify he informed Miguel Gonzales he was a police officer. Miguel Gonzales did not know, and had no reason to know the undercover officers, involved in a reverse sting operation were police officers. He was not aware of their status as law enforcement officers, nor

did he disregard this knowledge and continue to act in manner creating a substantial risk of serious injury.

The presentence report misconstrues the controlling language of §3A1.2.(b)., the section states the following:

> If during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement officer or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily health.

A defendant must know or have reason to know a victim is a police officer, then decide to assault the victim they know, or have reason to know is a police officer. The facts of the case place Miguel Gonzales is neither category. Even if Miguel Gonzales is accountable for the actions of the co-defendants in the apartment, the co-defendants had already assaulted Detective Torres before he informed them he was a police officer. The assault occurred before the co-defendants knew the victim's status and the assault was done regardless of the victim's status. Defense counsel respectfully requests the reject the strained reality reasoning of the Presentence Report, maintain the integrity of the Federal Sentencing Guidelines and reject a three level (3) increase based on Miguel Gonzales knowing or having reason to know the undercover agents in this cause were police officers.

FEDERAL SENTENCING GUIDELINE §5G1.3(b) IS APPLICABLE

The presentence report prepared for this sentencing fails to address guideline §5G1.3.(b)., titled *Imposition of Sentence on a Defendant Subject to an Undisclosed*

Term of Imprisonment. The subsection in mandatory terms, states the sentence in this cause shall run concurrently with the state sentence in cause number 91-00770.

Federal guideline §5G1.3.(b) reads as follows:

> If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

In the Guideline Commentary Application Notes, the following example is given illustrating subsection (b)'s application

> 2. Subsection (b) (which may apply only if subsection (a) does not apply), addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under §1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur for example, where a defendant is prosecuted both in federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct.

Federal Sentencing Guideline §5G1.3.(a), does not apply to the instant offense. Miguel Gonzales was not under a term of imprisonment, nor had he just been sentenced for, a term of imprisonment he had not yet commenced.

Defendant's case *is* the example given in the Commentary Application Notes. The undischarged term

of imprisonment is state cause number CR 91-0770. The offenses in state criminal indictment CR 91-00770 were fully taken into account in determining the offense level for the instant offense. The section of the Presentence Report titled *The Offense Conduct* is a recitation of the offenses in state cause number 91-0770. Count VI of the undischarged prison term involves the same 100 pounds of marijuana that is the subject of the instant offense. Counts II and III of the undischarged prison term involve the armed assault by the defendants against Detectives Torres and Gloria. Even if the Court assumes the federal indictment addresses different criminal transactions, all criminal transactions were part of the same course of criminal conduct contemplated by §5G1.3.(b) and illustrated in the Commentary Application Note.

Federal caselaw requires the Court run the sentence in this cause concurrent to state cause 91-0770. In *U.S. v. Evan*,___F.2d___,No. 92-3147 WL 306189, the appellate court affirmed the sentencing court's decision in ordering defendant's federal sentence run concurrent with his state sentence where the conduct in both cases was the same. In *U.S. v. Harris*, 990 F.2d 594 (11th Cir. 1993) the Court held that §5G1.3(b) requires concurrent sentencing if a defendant is prosecuted in federal and state court for different criminal transactions that are part of the same course of conduct, such as two drug sales. Concurrent sentences for an instant offense that involves a prior undischarged prison term and successive prosecutions involving the same course of conduct is a settled area of federal guideline caselaw. *U.S. v. McCormick*, 992 F.2d 437 (2nd Cir. 1993), *U.S. v. Conkins*, 987 F.2d 564 (9th Cir. 1993), *U.S. v. Ogg*, 992 F.2d 265 (10th Cir. 1993), *U.S. v. Prusan*, 967 F.2d 57 (2nd Cir. 1992), *U.S. v. Lechuga*, 975 F.2d 397 (7th Cir. 1992. Miguel Gonzales respectfully requests the Court

run the sentence in this cause concurrent with state cause 91-0770.

§5G1.3(b) ARGUMENT FOR ADJUSTED SENTENCE

The presentence report recommends the Court deny Miguel Gonzales credit for time unquestionably spent in federal custody. Miguel Gonzales respectfully requests that if the Court denies presentence credit, the Court adjust his sentence accordingly to account for the time Miguel Gonzales is denied. An adjusted sentence accounting for denied credit is consistent with Federal Sentencing Guideline §5G1.3(b), and is not considered a downward departure for guideline purposes (See Committee Commentary Application Note).

LEGAL ARGUMENT FOR DOWNWARD DEPARTURE

Miguel Gonzales was charged and convicted of crimes against the State of New Mexico on the same set facts that led to this federal prosecution. Mr. Gonzales was convicted of armed robbery, attempt to commit armed robbery, conspiracy to commit armed robbery and conspiracy to possess over eight ounces of marijuana. State District Judge Woody Smith imposed a nineteen and one half (19 1/2) year sentence, suspended six and one half (6 1/2) years of the sentence, and ordered Miguel Gonzales be remanded to a New Mexico Correctional facility for a term of thirteen (13) years. On May 8, 1992, the Office of the United States Attorney indicted Miguel Gonzales. Miguel Gonzales will serve two sentences, from two prosecutions, arising out of one fact pattern.

Miguel Gonzales is Cuban. The judicial system in

Cuba must differ dramatically from our own. The federal prosecution and trial began while the Defendant's state case was on appeal. Defendant could not be convinced a plea in federal court would not in some way affect his state appeal. The cultural differences between societies demanded Miguel Gonzales insist on a second trial even though the trial was not in his best interest. Miguel Gonzales faces a twenty year sentence out of the state conviction. Defendant requests the Court recognize the Defendant has, and will continue to be punished for these offenses.

EDWARD O. BUSTAMANTE
1412 LOMAS BLVD., NW
ALBUQUERQUE, NM 87104
(505) 842-0392

This certifies a copy of this document was sent to AUSA, Presiliano Torres, Alonzo Padilla, Attorney for Luis Leon, Angela Arrellanes, Attorney for Orlenis Hernandez-Diaz, Roberto Albertorio, Attorney for Mario Perez, and Barbara Dominguez, Federal Presentence Unit on August 26, 1993.

EDWARD BUSTAMANTE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 92-236JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendant*.

OBJECTIONS TO THE PRESENTENCE REPORT AND SENTENCING MEMORANDUM

COMES NOW the Defendant, and pursuant to United States Constitution Amend. V, Section 6A1.3 U.S.S.G., and Rule 32(c)3 of the Federal Rules of Criminal Procedure, hereby files the following challenges, objections and sentencing memorandum to the Presentence Report prepared by the U.S. Probation Office.

FACTUAL OBJECTIONS

Page 6, paragraph 13 states that while in the bedroom Mr. Hernandez-Diaz took a pillow, placed the pillow against Torrez' head and put the gun against the pillow. The testimony at trial and the supplemental report written by Torrez states that the pillow was place in the upper torso of his body.

The same paragraph states that while in the bedroom, Detective Torrez was asked if he was a police officer, but the detective was unable to respond. The testimony at trial and the statement from Torrez is as follows: "Luis pulls, grabs that bullet and starts yelling at me saying, 'What were you doing with this gun? Were you gonna rip me off!'. . . Somebody said, 'Are you a cop?' Okay I didn't say anything, I didn't want to tell 'em I was a cop because I wasn't sure what they were gonna do."

The representation by probation is misleading because Torrez could have responded, but it was in his best interest not to say anything.

The Defendant did not provide a statement for acceptance of responsibility because the federal conviction will be appealed and the state conviction is on appeal. In the event a conviction is reversed, the statement could not be used against the Defendant. Hernandez-Diaz wished to plea the federal indictment. However, two of the codefendants refused to plea. The policy of the U.S. Attorney's office is that all defendants plea, or none plea. The policy is an abuse of power because a codefendant has no control over the decision making of another codefendant, and yet is forced to live with the consequences of another persons judgement. The Defendant asks the Court to account for the dilemma that Hernandez-Diaz was forced into.

OBJECTION TO RECOMMENDATION OF A THREE LEVEL UPWARD ADJUSTMENT UNDER U.S.S.G. 3A1.2 (b)

Page 8, paragraph 23 states "the defendant and his codefendants were all involved in the conspiracy, taking Detective Torrez hostage and holding up Detective Gloria and ordering him to return to the apartment.

Prior to this, the detectives were asked if they were police officers as several unmarked police units were seen in the area before the drug transaction took place. Therefore, a three level increase is warranted." The basis for the recommendation is that the detectives were asked if they were police officers while traveling from the Circle K to the apartment. There is no factual basis for the recommendation. First, because the statement is inaccurate. The only person asked whether he was a police officer was Detective Torrez by Luis Leon. The use of the words "detectives were asked" in the plural is misleading. Second, the factual explanation provided by probation is incomplete. When Detective Torrez was asked whether he was a police officer, he responded no so that his undercover role would not be jeopardized. Luis Leon relied on this representation by following through with the plan to take Torrez to the apartment where the exchange of money for drugs would consummate. Third, Hernandez-Diaz was not in the car when Luis Leon asked Detective Torrez if he was a cop. Therefore, Hernandez-Diaz was not privy to the conversation. No evidence exists that Mr. Leon relayed this conversation to Hernandez-Diaz.

Mr. Hernandez-Diaz was in the apartment when Miguel Gonzales pointed a gun at Detective Stan Gloria. Hernandez-Diaz was not present when the gun was pointed at Gloria and Hernandez-Diaz had no knowledge of the occurrence. This clearly cannot be attributed to Hernandez-Diaz. Mr. Hernandez-Diaz did not know, and had no reason to know, the undercover officers involved in the reverse sting operation were police officers. All defendants were led to believe that the undercover officers were drug dealers and relied on this representation until the surveillance officers kicked the front door open.

U.S.S.G. 3A1.2(b) states:

> *during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury,*

increase by 3 levels.

Section 3A1.2(b) "explicitly conditions the increase on the factual determination that the defendants committed such assault 'knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer.' There is no room for ambiguity in its reading." *U.S v. Caslillo*, 924 F.2d 1227 (2nd Cir. 1991). Under facts similar to the case at bar, the Court held that 3Al.2(b) did not apply. In *Castillo*, undercover officer Johnson entered an apartment witn one Fernandez. A short time later Castillo entered the apartment. Fernandez then bolted and locked the apartment door. Johnson negotiated a quantity of cocaine for a price with Castillo while Fernandez stood behind Johnson. Castillo then measured 3 grams of cocaine on an index card while Fernandez walked into an adjoining room and return with a gun tucked in his waistband. After the exchange of money for cocaine, Johnson attempted to leave the apartment. Fernandez put his hand on Johnson's chest and said no. Fernandez showed the gun in his waistband to Johnson and placed his finger on the trigger. Johnson said everything is cool. Fernandez, with his hand on the gun's handle, said no. Castillo offered Johnson the cocaine on the index card. Johnson declined. Fernandez pulled the gun a little farther out of his waistband with his finger still on the trigger.

Johnson decided to ingest the cocaine after which he was allowed to leave the apartment.

The government submitted a letter in *Castillo* which stated [A]lthough the defendants did not know for sure that Officer Johnson was a police officer, they held the cocaine up to his nose and the gun to his torso precisely because they had "reasonable cause to believe" he was an undercover officer. Indeed, defendant Fernandez had less than two months prior to this offense been arrested by New York City Police for having sold cocaine to an undercover officer. The appeals court said the finding of the district court was deficient. There must be a factual finding that the defendants committed the assault "knowing or having reasonable cause to believe that a person was a law enforcement officer." *Castillo* at 1236. Given the facts of *Castillo*, the court said the findings of the district court was more the product of speculation than reasoning.

The government and the probation officer may attempt to justify the increase because Leon yelled at Torrez while Hernandez-Diaz was present in the bedroom: "What the hell were you doing with a gun? Why did you have a gun? Are you a cop?" Torrez did not respond. However, Hernandez-Diaz did not know for sure, Torrez was a police officer nor did he have reasonable cause to believe that Torrez was an officer. Hernandez-Diaz did not travel from the Circle K to the apartment and observe unmarked and marked police cars. Hernandez-Diaz at no time had knowledge of Torrez's status as a police officer until surveillance officers kicked the door yelling "police." When Hernandez-Diaz realized the police were involved, he asked Leon to

open the door and he offered no resistance. The assertion that Hernandez-Diaz knowing or had reasonable cause to believe that Torrez was a police officer is based on speculation rather than fact.

FEDERAL SENTENCING GUIDELINE SECTION 5G1.3(b) IS APPLICABLE

The presentence report prepared for this sentencing fails to address guideline Sec. 5G1.3.(b)., titled *Imposition of Sentence on a Defendant Subject to an Undisclosed Term of Imprisonment.* The subsection in mandatory terms, states the sentence in this cause shall run concurrently with the states sentence in cause number 91-0770.

Federal guideline Sec. 5G1.3(b) reads as follows:

If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrenty to the undischarged term of imprisonment.

In the Guideline Commentary Application Notes, the following example is given illustrating subsection (b)'s application

2. *Subsection (b) (which may apply only if subsection (a) does not apply), addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under Sec. 1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur for example, where a defendant is prosecuted both in federal and state court, or in two or more federal jurisdictions, for the same criminal conduct*

or for different criminal transactions that were part of the same course of conduct.

When a sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense. Example: The defendant has been convicted of a federal offense charging the sale of 40 grams of cocaine. Under Sec. 1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of a additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court (the defendant received a nine-month sentence of imprisonment, of which he has served six months at the time of sentencing on the instant federal offense). The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 55 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should not on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under Sec.5G1.3(b) with six months served in state custody.

Federal Sentencing Guideline Sec. 5G1.3(a), does not apply to the instant offense. Hernandez-Diaz did not

commit the instant offense while under a term of imprisonment.

Defendant's case *is* the example given in the Commentary Application Notes. The undischarged term of imprisonment is state cause number CR 91-0770. The offenses in state criminal indictment CR 91-0770 should be fully taken into account in determining the offense level for the instant offense. The section of the Presentence Report titled *The Offense Conduct* is a recitation of the offenses in state cause number 91-0770. Count VI of the undischarged prison term involves the same 100 pounds of marijuana that is the subject of the instant offense. Counts II and III of the undischarged prison term involve the armed assault by the defendants against Detectives Torrez and Gloria. Even if the Court assumes the federal indictment addresses different criminal transactions, all criminal transactions were part of the same case of criminal conduct contemplated by Sec. 5G1.3(b) and illustrated in the Commentary Application Note.

Federal case law requires the Court run the sentence in this cause concurrent to state cause 91-0770. In *U.S. v. Evan*, __F.2d__ , No. 92-3147 WL 306189, the appellate court affirmed the sentencing court's decision in ordering defendant's federal sentence run concurrent with his state sentence where the conduct in both cases was the same. In *U.S. v. Harris*, 990 F.2d 594 (11th Cir. 1993) the Court held that Sec. 5G1.3(b) requires concurrent sentencing if a defendant is prosecuted in federal and state court for different criminal transactions that are part of the same course of conduct, such as two drug sales. Concurrent sentences for an instant offense that involves a prior undischarged prison term and successive prosecutions involving the same course of conduct is a settled area of federal guideline case law. *U.S. v.*

McCormick, 992 F.2d 437 (2nd Cir. 1993), *U.S. v. Conkins*, 987 F.2d 564 (9th Cir. 1993), *U.S. v. Ogg*, 992 F.2d 265 (10th Cir. 1993), *U.S. v. Prusan*, 967 F.2d 57 (2nd Cir. 1992), *U.S. v. Lechuga*, 975 F.2d 397 (7th Cir. 1992). Hernandez-Diaz respectfully requests the Court run the sentence in this cause concurrent with state cause 91-0770.

SECTION 5G1.3(b) ARGUMENT FOR ADJUSTED SENTENCE

The presentence report recommends the Court deny Hernandez-Diaz credit for time unquestionably spent in federal custody. Mr. Hernandez-Diaz was in federal custody from October 27, 1992 to November 15, 1992, he was writed into state custody, he was then returned into federal custody on June 9, 1993, and has remained in federal custody. Hernandez-Diaz respectfully requests that if the Court denies presentence credit, the Court adjust his sentence accordingly to account for the time Hernandez-Diaz is denied. An adjusted sentence accounting for denied credit is consistent with Federal Sentencing Guidelines Sec. 5G1.3(b), and is not considered a downward departure for guideline purposes (See Committee Commentary Application Note).

ARGUMENT FOR DOWNWARD DEPARTURE

Orlenis Hernandez-Diaz was charged and convicted on crimes against the State of New Mexico on the same set of facts that led to this federal prosecution. Mr. Hernandez-Diaz was convicted of armed robbery, attempt to commit armed robbery, conspiracy to commit armed robbery and conspiracy to possess over eight ounces of marijuana. State District Judge Woody Smith imposed twenty-two (22) years, suspended seven and one half (7 1/2) years of the sentence, and ordered Hernandez-Diaz be remanded to a New Mexico Correctional facility for a term of fourteen and one half

(14 1/2) years. On May 8, 1992, the Office of the United States Attorney indicted Hernandez-Diaz. Hernandez-Diaz will serve two sentences, from two prosecutions, arising out of one fact pattern.

Hernandez-Diaz is Cuban. The judicial system in Cuba must differ dramatically from our own. The federal prosecution and trial began while the Defendant's state case was on appeal. Defendant could not be convinced a plea in federal court would not in some way affect his state appeal. The cultural differences between societies demanded Hernandez-Diaz insist on a second trial even though the trial was not in his best interest. Defendant requests the Court recognize the Defendant has, and will continue to be punished for these offenses.

Respectfully submitted,

/s/ ANGELA ARELLANES

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This certifies that a true copy of
this document was sent to AUSA,
Presiliano Torres, Alonzo Padilla,
Attorney for Luis Leon, Ed Bustamante,
Attorney for Miguel Gonzales, Roberto
Albertorio, Attorney for Mario Perez,
Federal Presentence Unit on 3rd day
of September, 1993.

/s/ ANGELA ARELLANES

Angela Arellanes

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARIO PEREZ, ET AL., *Defendant*.

OBJECTIONS TO THE PRESENTENCE REPORT AND SENTENCING MEMORANDUM

MARIO PEREZ, through counsel Roberto Albertorio, presents Objections to the Presentence Report prepared by Federal Probation and Sentencing Memorandum requesting downward departure.

OBJECTIONS TO THE PRESENTENCE REPORT

MARIO PEREZ was found guilty after a jury trial of Counts I, II, and VI of the indictment as charged.

MARIO PEREZ first objects to the factual inaccuracy of Mr. Perez' custodial status denying him jail credit for these offense. Mr. Perez has been in custody since his arrest on April 23, 1991 in the State of Florida pursuant to a warrant issued by the Second Judicial District Court, County of Bernalillo, State of New Mexico. MARIO PEREZ has been in federal custody since May 8, 1992, pursuant to the Grand Jury Indictment on this matter. Therefore, Mr. Perez is entitled to jail credit from May 8, 1992 to the present.

MARIO PEREZ next objects to the factual assumption of Paragraph fourteen (14) of the report wherein it is alleged that Mr. Perez threatened to kill Detective

Torrez and further went into the back room with co-defendant Mr. Hernandez-Diaz. The testimony at trial by Detective Torrez was that he was accosted by Mr. Hernandez-Diaz, assisted by Mr. Leon and taken into the back room by Mr. Hernandez-Diaz. There was no evidence introduced at trial by anyone that MARIO PEREZ threatened Detective Torrez or participated in his abduction and subsequent transferring into the back room. Furthermore, there was no evidence introduced at trial that MARIO PEREZ was in the back room. The official transcript will reveal that Detective Torrez was apprehended by co-defendant Hernandez-Diaz threatened and transferred to the back room with the assistance of Mr. Leon. The Court will recall that the testimony involving Mr. Perez was solely that he was in the living room of the apartment rented by Mr. Leon. Mr. Perez only involvement was requesting from Detective Torrez whether there was the actual amount of marijuana available. Detective Torrez testified that once apprehended, someone from the rear patted [*sis*] him down and removed his revolver. However, it was not clear to Detective Torrez whether this was done by either Mr. Leon or MARIO PEREZ. As Mr. Leon was later identified as the person who had Detective Torrez weapon, it can only be assumed that it was he who actually removed the officers weapon. Therefore, the conclusions drawn by the U.S. Probation Officer are without foundation unsupported by the evidence at trial and should be disregarded.

MARIO PEREZ next objects to Paragraph twenty-four (24) referencing Victim Related Adjustment. U.S. Probation requests that a three level increase is warranted because allegedly that defendant or a person for whose conduct the defendant is otherwise accountable knew or had reasonable cause to believe that a person

was a law enforcement officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury.

The facts is this case, and the official trial transcript will reveal that the entire matter was under cover of unidentified police officers. At no time prior and/or immediately subsequent to the abduction of Detective Torrez was MARIO PEREZ involved in any of the negotiations with any of the officers involved in this operation. There were no marked vehicles and no one identified himself with an enforcement agency. In point of fact, even after Detective Torrez was abducted, without the participation of MARIO PEREZ, did Detective Torrez announce that he was a law enforcement officer. The Court will recall that the evidence introduced at trial was the MARIO PEREZ was not present nor involved in any way with any discussions with either Detective Torrez and Detective Gloria. The photos admitted at trial indicating the participation of the co-defendants does not include any participation by MARIO PEREZ. MARIO PEREZ participation in this entire matter was only subsequently revealed after his arrest in Florida. There was no evidence at trial that any of the Defendants knew or should have known that the undercover officers were law enforcement. Once the assisting officers revealed themselves, this entire plan was abandoned. Two of the defendants in the apartment surrendered without incident and two fled, later to be apprehended. Therefore, MARIO PEREZ, through counsel respectfully requests the Court to decline to increase the guidelines by three levels upon a finding that there is no basis for the conclusions drawn by the U.S. Probation Officer.

MARIO PEREZ next objects to Paragraph eighteen (18) referencing Adjustment for Acceptance of

Responsibility, and the denial of a two level adjustment. The official Court transcript will reveal and the Court may recall that a plea offer made by the Government was accepted by MARIO PEREZ to accept responsibility to Count II of the Indictment. This would have exposed MARIO PEREZ to a mandatory five (5) year term. The government took the position that the plea offer had to be accepted by all four defendants. As two of the co-defendants did not wish to accept the offer, MARIO PEREZ was thereby prejudiced. It is anticipated that MARIO PEREZ will seek an appeal of his conviction and any statements made to the U.S. Probation Officer regarding culpability may be used against him at a subsequent trial if MARIO PEREZ should elect to testify in his own defense. Therefore, MARIO PEREZ respectfully request the Court to apply the two level decrease in determining the appropriate level for sentencing.

Counsel for MARIO PEREZ has reviewed the objections to sentencing offer on behalf of MIGUEL GONZALES, by his attorney Edward O. Bustamante, and joins him in his motion.

WHEREFORE, Counsel for defendant MARIO PEREZ respectfully request that the Court find that there is merit in the objections filed with this motion and further determine that the appropriate level for sentencing consideration is Twenty (20) thereby providing a sentencing guideline imprisonment range of forty-one (41) to fifty-one (51) months.

Respectfully submitted

/s/ ROBERT ALBERTORIO

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I certify that a true copy
this document was delivered
AUSA Presiliano Torres and
U.S. Probation on September 8, 1993

/s/ ROBERTO ALBERTORIO

ROBERTO ALBERTORIO

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 92-236 JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORNELIS HERNANDEZ-DIAZ, MARIO PEREZ AND MIGUEL GONZALES, *Defendants*.

SENTENCING MEMORANDUM

Comes now the United States of America by and through Larry Gomez, United States Attorney for the District of New Mexico and Thomas L. English, Assistant U.S. Attorney for said District, and for its Sentencing Memorandum states:

1. Defendants Hernandez-Diaz, Perez and Gonzales were convicted of Conspiracy to Possess Marijuana with the Intent to Distribute, Possession of a Firearm During and in Relation to a Drug Trafficking Crime, and Aiding and Abetting in violation of 21 U.S.C. § 846, 18 U.S.C. § 924(c) and 18 § U.S.C. 2, respectively. Subsequent to the conviction, the United States Probation Office prepared a pre-sentence report (PSR) which addressed the application of the United States Sentencing Guidelines (U.S.S.G.) to the respective defendants and offenses of conviction.

2. Defendant Hernandez-Diaz filed objections to the PSR regarding factual inaccuracies and the application

of the Sentencing Guidelines. This memorandum addresses application of the Sentencing Guidelines, specifically addressing § 5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment.

3. Section 5G1.3 U.S.S.G. provides in pertinent part:

> (b) . . . [if] the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

4. In addressing the objection regarding § 5G1.3(b), the Probation Office has stated "the sentence imposed on the instant offense should run concurrently with the State of New Mexico sentence for which the defendant is currently confined." PSR at p.3. This response is in direct contradiction to statutory authority regarding the violation of 18 U.S.C. § 924(c) which requires that the five year sentence run consecutive to any other sentence. 18 U.S.C. § 924(c); and *United States v. Lanzi*, 933 F.2d 824 (10th Cir. 1991). Accordingly, the five year statutory minimum sentence for violation of 18 U.S.C. § 924(c) must run consecutive to any other sentence, including the state sentence previously imposed.

5. The sentence for violation of 21 U.S.C. § 846, Conspiracy to Possess Marijuana with Intent to Distribute, must be imposed subject to § 5G1.3, U.S.S.G., in conjunction with 18 U.S.C. § 3584. *United States v. Shewmaker*, 936 F.2d 1124, 1127-28 (10th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 884 (1992); and *United States v. Gullickson* 981 F.2d 344 (8th Cir. 1992).

6. From the language of § 5G1.3, and the application

notes following thereafter, the issue of concurrent versus consecutive sentences runs only to the offenses which are *fully* taken into account in the sentence for the instant offense. At the state trial, Defendants Hernandez-Diaz, Perez were convicted and sentenced for the following offenses: 9 years as to Armed Robbery; 3 years as to Attempt to Commit a Felony, to wit: Armed Robbery of Marijuana; 3 years as to Conspiracy to Commit Armed Robbery; 1 and 1/2 years as to False Imprisonment; and 1 and 1/2 years as to Conspiracy to Commit Possession of Marijuana (8 oz. or more). Second Amended Judgment Partially Suspended Sentence and Commitment attached hereto as Exhibits 1, 2 and 3. Defendant Gonzales was convicted and sentenced as the same as the other defendants, with the exception of False Imprisonment. It is the position of the United States that only the state offense of Conspiracy to Possess Marijuana involves the application of § 5G1.3(b). Thus, this Court should determine the offense level for the federal violation involving Conspiracy to Possess Marijuana with Intent to Distribute and run 18 months of that sentence concurrent with the state sentence for the same offense.

7. The remaining term of imprisonment should run consecutive to the state sentence. Should the Court find that the remaining state convictions for Armed Robbery; Attempt to Commit a Felony, to Wit: Armed Robbery of Marijuana; Conspiracy to Commit Armed Robbery; and False Imprisonment do not invoke the application of § 5G1.3(b), then § 5G1.3 (c) would apply. Application of § 5G1.3 (c) would require the Court to calculate the offense levels for the remaining state convictions as if they had been federal offenses. *See, United States v. Gullickson*, 981 F.2d 344 (8th Cir. 1992). This calculation would result in a guideline sentence which

would exceed the currently imposed state court sentence by more than sixty (60) months. Thus, this Court can order that the federal sentence, exceeding the 18 month period, run consecutive to the state sentence.

8. After applying § 5G1.3 to the offense involving Conspiracy to Possess Marijuana with Intent to Distribute, the Court then can make a determination regarding a departure from the guideline application. *See United States v. Shewmaker*, 936 F.2d 1124 (10th Cir. 1991), *cert. denied*,— U.S.,— 112 S.Ct. 884 (1992) (applying § 18 U.S.C. 3584 to U.S.S.G. § 5G1.3(a) involving offenses committed while a defendant was serving a term of imprisonment). In *Shewmaker*, the Tenth Circuit addressed the apparent conflict between 18 U.S.C. § 3584 and the Sentencing Guidelines. The Tenth Circuit ruled that the two provisions of law should be harmonized requiring the application of § 5G1.3, but indicating that the Court remains free to depart from such an application of the Sentencing Guidelines. In *United States v. Gullickson*, 981 F.2 344 (8th Cir. 1992), the Eighth Circuit stated:

> A sentencing court may, however exercise discretion under § 3584(a) and depart from the sentencing range established by § 5G1.3(c) when sufficient justification exists. In determining whether sufficient justification for departure exists, District Courts must follow usual guideline procedures. [citations omitted].

Id. at 349. In the present case, the Defendants conduct was of such a grievous nature, that an upward departure certainly is warranted.

9. It is clear that this Court does not have discretion to ignore the application of § 5G1.3, U.S.S.G. The United States respectfully requests that the Court

make a finding that the application of that section applies only to the conviction for violation of 21 U.S.C. § 846 as 18 U.S.C. § 924(c) as a statutory mandated consecutive sentence. Further, the United States requests that the Court find that the only undischarged term of imprisonment resulting from the state court conviction which invokes the application of § 5G1.3(b) is that for the Conspiracy to Possess Marijuana. Making these findings, the Court has discretion, subject to § 5G1.3(c), to run any term of imprisonment, exceeding the 18 months concurrent time to the state offense, consecutive to the state term of imprisonment. Additionally, the Court has discretion to make additional findings which would warrant a departure from the application of the sentencing guidelines, and allow the entire federal sentence to run consecutively to the state sentences.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy
of the foregoing pleading was
hand delivered to opposing counsel
of record this __ day of
September, 1993.

THOMAS L. ENGLISH
Assistant U.S. Attorney

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 92-236 JC 004

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MIGUEL GONZALES, *Defendant.*

RESPONSE TO GOVERNMENT'S SENTENCING MEMORANDUM

The government memorandum ignores the 1992 Amendment to § 5G1.3., the Commentary Application Notes of the Federal Sentencing Guidelines, federal Guideline caselaw, the relevant conduct considered in investigating, preparing and arriving at an offense level in the Presentence Report, and the facts and history of this case. The government concedes that § 5G1.3(b) applies in part to the instant sentence. Their concession reveals the weakness of their position. By asking the court to run the federal sentence concurrent with only eighteen months of the state sentence, the government requests the court delay the commencement of the federal sentence for years until eighteen months of the state sentence remains.

1. *§ 5G1.3(b), Commentary Application Note 2. Clearly Requires the Instant Offense Run Concurrently.*

Commentary Application Note 2.; to § 5G1.3.(b) states the following:

> Subsection (b) which may only apply if subsection (a) does not apply, addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under 1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example, where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or *for different criminal transactions that were part of the same course of conduct.* (Emphasis added).

§1B1.3. titled *Relevant Conduct (Factors that Determine the Guideline Range)*, encompasses Chapters Two (Offense Conduct) and Three (Adjustments) of the Federal Sentencing Guidelines. The question for the court in considering whether § 5G1.3.(b) is applicable, is whether the prior conduct, resulting in an undischarged term of imprisonment was fully taken into account in reaching the offense level for the instant offense the court is now imposing a sentence. The question for the court under the language of § 5G1.3.(b) is not whether federal prosecutors charged, or could have charged the same offenses as in state court, or whether the instant offense creates the same guideline exposure as the undischarged term of imprisonment.

In determining the guideline for the instant offense the prior conduct was fully taken into account. The government concedes the instant offense should run concurrently to the state Conspiracy to Commit Possession of Marijuana conviction. But in addition, the Presentence Unit in their *Offense Level Computation*, fully took into account the armed assault, and the binding and gagging of Detective Torrez in paragraphs twenty-three and twenty-four of the presentence report in reaching an offense level of twenty five (25). The armed assault, and restraint of Detective Torrez are inseparable from the Armed Robbery, Attempt to Commit Armed Robbery, and Conspiracy to Commit Armed Robbery resulting in the indischarged term of imprisonment. Even if the state prosecution involved different criminal transactions they are beyond question part of the same criminal conduct. Those criminal transactions and were fully taken into account in determining the instant offense level. The government's response, in essence, is that § 5G1.3.(b) is applicable in successive state-federal prosecutions *only* when the exact charges for the exact criminal transactions are reprosecuted in federal court. The government's ultra-narrow interpretation of § 5G1.3.(b), in the face of clear guidance in the Commentary Application Notes renders § 5G1.3.(b) meaningless.

Recent federal caselaw, and the facts underlying the basis of those opinions directly conflict with the government's narrow interpretation of § 5G1.3(b). In *United States v. Harris*, 990 F.2d 594 (11th Cir. 1993), the sentencing court was reversed for imposing a consecutive sentence where the government conceded the federal offense was part of the same course of conduct. *Harris*, supra, at 595. The defendant in *Harris*, was indicted and convicted on a federal drug charge. The opinion reversing makes no specific requirement the charges be exactly the same. The example given by the *Harris*, at 595, court is quite the opposite; § 5G1.3(b) requires concurrent sentencing if a defendant is prosecuted in fed-

eral and state court for different criminal transactions that are part of the same course of conduct, such as two drug sales. The opinion does not state the two drug sales need be the same type of drug, or the same quantity, or the same sale, only that the two be part of the same course of conduct.

In *United States v. Evans*, 1993 WL 306189 (7th Cir. (Ill,), the defendant was convicted in state court for the crime of Participating in a Drug Conspiracy. A year later the defendant was indicted on federal drug conspiracy charges relating to the same conduct. The sentencing court ran the federal sentence concurrent to the state sentence and subtracted 23 months from the bottom of the guideline range. The Seventh Circuit affirmed on other grounds, but noted in its affirmance the sentencing correctly applied § 5G1.3(b) court. The appellate court made no requirement the charges be identical, only that they relate to the same conduct.

2. *§5G1.3.(b) As Amended Does Not Require The Court Impose A Sentence Equal To The Total Punishment If All The Sentences Were Imposed At The Same Time.*

Commission Amendment 466 effective November 1, 1991 completely revises § 5G1.3.(b). The amended version deletes all language requiring the court impose a sentence equal to the combined punishment of all offenses as if imposed in one sentence. This court is required to apply the version of the guidelines effective at the time of sentencing. *United States v. Gross*, 979 F.2d 1048, 1050 (5th Cir. 1992).

The government requests the court look to *United States v. Gullickson*, 981 F.2d 344 (8th Cir. 1992), for guidance in this sentencing. *United States v. Gullickson*, supra, is inapplicable to the sentencing before this court.

The defendant in *Gullickson*, was sentenced under § 5G1.2(b) and § 5G1.3(c). The defendant in *Gullickson*, supra, was convicted of Forgery in state court, was then convicted of Burglary in state court, finally the defendant was charged and convicted of Aggravated Sexual Abuse in federal court. The defendant's criminal conduct and criminal transactions in *Gullickson* are not in any way related to one another. The court in *Gullickson*, never applies nor interprets the language nor the Amendments of § 5G1.3.(b). The court in *Gullickson*, examines the interplay of § 5G1.2(b), and § 5G1.3(c). This court in determining an appropriate sentence for Miguel Gonzales cannot look to *United States v. Gullickson*, supra for guidance as to whether the instant offenses should run concurrent to the prior undischarged term of imprisonment.

The government's reliance on *United States v. Shewmaker*, 936 F.2d 1124, (10th Cir. 1991), is also misplaced. *Shewmaker*, supra does not address § 5G1.3.(b). In *Shewmaker*, the defendant committed separate, unrelated criminal acts. § 5G1.3 of the Guidelines required the sentences in *Shewmaker* run consecutively. The sentencing court in *Shewmaker* ignored § 5G1.3. and sentenced the defendant to concurrent time. The appellate court held the sentencing court erred in running the defendant's sentences concurrently where clearly Guideline provision § 5G1.3., required a consecutive sentence. However; the court's analysis in *Shewmaker*, does illustrate why this court is required to run the sentences in the instant offense concurrent to Miguel Gonzales' 234 month sentence in state court.

The sentencing court in *Shewmaker*, relying on *United States v. Willis*, 881 F.2d 823 (9th Cir. 1989), ruled Guideline § 5G1.3 is *ultra vires* because it is inconsistent with 18 U.S.C. § 3584(a). § 3584(a) gives the

court statutory authority to run any sentence concurrent or consecutive.) *Shewmaker*, rejects the reasoning in *Willis*, supra, and harmonizes the interplay of 28 U.S.C. § 994(a)(1)(D); which delegates to the Sentencing Guideline Commission the authority to promulgate Guidelines regarding concurrent and consecutive sentences, 28 U.S.C. § 994(b)(1); which requires the Guidelines be consistent with 18 U.S.C. § 3584(a), 18 U.S.C. § 3584(a), and Guideline § 5G1.3.(b); which mandates concurrent sentences in certain situations.

In *Shewmaker*, Guideline § 5G1.3., and § 3584(a) are reconcilable for two reasons, first, the particular guideline at issue may suggest circumstances or factors that, if present, may provide the basis for departure and second, the court retains discretion to depart, subject to review, if it determines that factors relevant to the sentencing have not been adequately addressed by the Guidelines. *Shewmaker*, at 1127. *Shewmaker*, at 1128, describes 18 U.S.C. § 3584(a) as a general provision concerning consecutive and concurrent sentences, whereas 28 U.S.C. § 994(a)(1)(D) and Guideline § 5G1.3. are specific provisions qualifying or limiting the general provision by requiring the court depart pursuant to Guideline principles.

Applying *United States v. Shewmaker*, to the present sentencing clearly shows this court must follow the specific provision of Guideline § 5G1.3(b), and run the instant offense concurrent to the state charges. First, as argued above, it is beyond question the instant offense is the same criminal conduct, or different criminal transactions from the same criminal conduct. Second, the Presentence Report after a thorough investigation, identifies no basis for departure in the instant sentencing. (Paragraph 71., Part F. Factors That May Warrant Departure). Neither does the Presentence Report indi-

cate Miguel Gonzales impeded or obstructed justice, (Paragraph 16.), or that he had either a mitigating or aggravating role in the offense. Finally, all factors relevant to this sentencing have been addressed adequately in the Guidelines. Guideline § 5G1.3.(b) in its Commentary Application Notes uses successive state/federal prosecutions for the same conduct, or different criminal transactions out of the same criminal conduct as its example when § 5G1.3.(b) should be applied. The instant offense involves a successive state/federal prosecution for the same criminal conduct or different criminal transactions from the same course of criminal conduct. The government was required to adhere to Justice Manual § 9-2.142, the *Petite* policy before bringing this case. The Sentencing Guideline Commission has fully, and adequately addressed all relevant factors pertaining to the sentencing before this court. The fact the government opposes concurrent sentences, or are unhappy with the ultimate outcome of their successive prosecution are not relevant factors this court can consider.

Amendment 466 eliminates all language in Guideline § 5G1.3., requiring the court fashion a sentence "as if all offenses had been sentenced together." In contrast, federal caselaw continues to suggest the court ought impose a sentence in such a manner. *United States v. Harris*, 990 F.2d 594, 595 (11th Cir. 1993).

Under the circumstances of this case, Miguel Gonzales is *already* serving a sentence as if the all offenses had been imposed under Guideline principles. Miguel Gonzales was given a 234 month sentence by State District Judge Woody Smith.

In discussions with the Albuquerque Federal Presentence Unit defense counsel was informed a worst

case scenario under the Guideline for the state charges is a Guideline range of 78 to 97 months. The Attempted Armed Robbery and the Conspiracy are grouped for sentencing purposes. Miguel Gonzales faces a statutory maximum of five (5) years for the instant drug charges. Assuming the instant offense and the state offenses do not group, Miguel Gonzales under a worst case scenario, faces thirteen years, one month or 157 months, under the Federal Guidelines. If the court is required to impose a sentence equal to a sentence as if all offenses had been sentenced simultaneously, the concern of the Federal Guideline Commission that Miguel Gonzales be incrementally punished has already been addressed by the state sentence. A 234 month state sentence is substantial and severe punishment. Excluding the 18 U.S.C. § 924(c) gun enhancement, Miguel Gonzales faces less time under the Guidelines. No sound policy reason exists to incrementally punish Miguel Gonzales when he already faces a longer sentence than if he had been prosecuted in federal court on *all* counts.

3. *The Second Addendum To The Presentence Report Recommends The Instant Offense Run Concurrently.*

On September 17, 1993, the Office of Probation filed a response to the Government's Sentencing Memorandum. The probation Office contacted the United States Sentencing Commision. The Commission agrees § 5G1.3(b) applies and the instant offense should run concurrently with the state sentence.

4. *Conclusion.*

Miguel Gonzales respectfully requests the Court run the instant offense concurrently with his 234 month state sentence. He further requests the court adjust the sentence to account for his time spent in federal custody.

Respectfully submitted by,

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This certifies a copy of this memorandum was sent to Alonzo Padilla, attorney for Luis Leon, Roberto Albertorio, attorney for Mario Perez, Angela Arrellanes, attorney for Orlenis Hernandez-Diaz, Presiliano Torres, AUSA, and Barbara Rodriguez, United States Probation on September 24, 1993.

Edward O. Bustamante

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. CR. 92-236JC

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ORLENIS HERNANDEZ-DIAZ, *Defendants*.

DEFENDANT'S REPLY TO THE GOVERNMENT'S SENTENCING MEMORANDUM

The Court ordered the Defendant on September 8, 1993, to address two issues relating to § 5G1.3(b) in his reply to the Government's Sentencing Memorandum. First, whether the Court has discretion under § 5G1.3(b) to impose the sentence in Federal Court consecutive to the sentence imposed in State Court? Second, whether the Court has authority to depart from the guidelines? The Defendant respectfully requests the Court to impose a base offense level of twenty (20) for a period of 33-41 months. Adjust the base level by two levels pursuant to § 3A1.3 for restraint of victim. Adjust the level downward for acceptance of responsibility for a net of 33-41 months. The sentence will be increased by five (5) years pursuant to 18 U.S.C. 924(a)(1). The Defendant further requests that the sentence imposed run concurrent to the state sentence.

I. § 5G1.3(b) is mandatory in its terms that the sentence for the second conviction shall run concurrent to the sentence imposed for the first conviction for offenses that are part of the same course of conduct.

Section 5G1.3(b) states that a sentence for the instant offense "*shall be* imposed to run concurrently to the undischarged term of imprisonment" which resulted from offenses that have been fully taken into account in the determination of the offense level for the instant offense. *U.S. v. Conkins*, 987 F.2d 564 (9th Cir. 1993). The Court has no discretion to impose a consecutive sentence. *U.S. v. Harris*, 990 F.2d 594 (11th Cir. 1993). The "instant offense" is the conviction in Federal Court for Conspiracy to Possess Marijuana with Intent to Distribute, Possession of Marijuana and Possession of a Firearm During and in Relation to a Drug Trafficking Crime. The "undischarged term of imprisonment" that Defendant Hernandez-Diaz is serving is Armed Robbery (Firearm Enhancement), Attempt to Commit Armed Robbery (Firearm Enhancement), False Imprisonment (Firearm Enhancement) and Conspiracy to Commit Possession of Marijuana. The offenses in state court were fully taken into account in determining the guideline for the instant offense. The Presentence Unit fully accounted for the armed assault, the binding and gagging of Detective Torres, the restraint of Detective Torres and the use of firearms in paragraphs 23 and 24 of the presentence report.

The Government concedes the applicability of 5G1.3(b) in this case, but suggests that the court run 18 months of the federal sentence concurrent with the conspiracy to possess marijuana count of the state sentence. The balance of the term would run consecutively to the state time. The sentence suggested by the Government would delay service of the sentence of this Court for over ten (10) years, a result not intended by the Commission.

U.S. v. Harris suggests that the Court impose a sentence equal to the total punishment that would have been imposed had all sentences been imposed at the same time. However, Commission Amendment 466, effective November 1, 1991, revised § 5G1.3(b). The amendment deleted language that the Court impose a sentence equal to the combined punishment of all offenses as if imposed in one sentence.

The Constitutional basis for the sentence in the instant offense to run concurrent with the undischarged term for the state conviction is the Double Jeopardy Clause of the Fifth Amendment. "The Sentencing Commission requires concurrent sentencing in order to avoid multiple punishments." *U.S. v. McCormick*, 992 F.2d 437 at 441. (2nd Cir. 1993). The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution after conviction. It protects against multiple punishments of the same offense. *North Carolia v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d. 656 (1969). "The Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *McCormick* at 439. Citing Exparte Lange, 85 U.S. (18 Wall). The instant conviction stems from the identical conduct, firearms and marijuana that was the basis for the conviction in state court. Defendant Henandez-Diaz received twenty-two (22) years of which seven and one half (7.5) years was suspended leaving a balance of fourteen and one half (14.5) years to serve. The imposition of a consecutive sentence in this case for any count, including use of a Firearm During or in Relation to a Drug Traffacking Crime, would run afoul with the purpose of the Double Jeopardy Clause. The Defendant is clearly being twice punished for the same offense. The

Defendant was convicted and sentenced in state court for conspiracy to possess marijuana with intent to distribute as he was in federal court. The Defendant was convicted and sentenced to four separate counts of a firearm enhancement in state court which were run consecutively. Therefore, the Defendant has been punished for use of a firearm during and relation to a drug trafficking crime. An increase of the sentence for victim related adjustments as recommended by probation have likewise been imposed by the state court. The state court imposed nine (9) years for armed robbery and eighteen (18) months for false imprisonment. Thus, the Defendant has been previously punished for the offenses now before the Court.

A consecutive sentence pursuant to 18 U.S.C. § 924(a)(1) would fragment the Court's sentence. The base level of 33-41 months, not accounting for adjustments, would be served, followed by service of the balance of the state sentence, followed by service of the federal firearm count. A concurrent sentence to the state sentence with regard to 18 U.S.C. 924(a)(1) would cure the problem caused by the successive prosecutions in state and federal court.

II. The Court has discretion, limited by 18 U.S.C. 3553(a) and 18 U.S.C. 3553(b) to depart upward, which would in effect yield a consecutive sentence.

When the sentencing guidelines require a concurrent sentence, the district court has authority under 18 U.S.C. 3584(a) to impose a consecutive sentence if it follows the procedures for departing from the guidelines. *U.S. v. Harris*, supra. *U.S. v. Shewmaker*, 936 F.2d 1124 10th Cir. (1991). The steps for departure are outlined in *Harris* and *Shewmaker* as follows. The Court has a gen-

eral grant of discretion to depart from the sentencing guidelines under 18 U.S.C. 3584(a). The court's discretion is limited by the factors listed under 18 U.S.C. 3553(a) and (b) pursuant to 18 U.S.C. 3584(b). 18 U.S.C. 3553(b) reads as follows:

> (b) ***Application of guidelines in imposing a sentence.***—*The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from the described. In determining wheather a circumstance was adquately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.*

The circumstances of this case were adequately accounted for by the Sentencing Commission. The Commission provided a specific guideline provision which addresses the sentence in federal court that is imposed after a conviction and sentence in state court based on the same criminal conduct. The application notes provide an illustration of circumstances where the guideline would apply. The facts of this case is the illustration. The specific provision controls before consideration of the general provision. *U.S. v. Shewmaker*, 936 F.2d 1124 (10th Cir. 1991). An upward departure is unwarranted in light of 5G1.3(b) and the lengthy sentence imposed in state court.

The government cites *U.S. v. Gullickson*, 981 F.2d 344 (8th Cir. 1992), for guidance in this case. *U.S. v. Gullickson*, supra, is of no use to the Court. The defendant

in *Gullickson*, was sentenced under § 5G1.2(b) and § 5G1.3(c). The defendant in *Gullickson*, supra, was convicted of Forgery in state court, was then convicted of Burglary in state court, finally the defendant was charged and convicted of Aggravated Sexual Abuse in federal court. The defendant's criminal conduct and criminal transactions in *Gullickson* were not in any way related to one another. The court in *Gullickson*, never applies nor interprets the language not the Amendments of § 5G1.3(b). The court in *Gullickson*, examines the interplay of § 5G1.2(b), and § 5G1.3(c). This court in determining an appropriate sentence for Orlenis Hernandez-Diaz cannot look to *U.S. v. Gullickson*, supra for guidance as to whether the instant offenses should run concurrent to the prior undischarged term of imprisonment.

The government's reliance on *U.S. v. Shewmaker*, 936 F.2d 1124, (10th Cir. 1991), is also misplaced. *Shewmaker*, supra does not address § 5G1.3(b). The Court addressed § 5G1.3(a) prior to the November 1, 1991 amendment. In *Shewmaker*, the defendant committed separate, unrelated criminal acts. § 5G1.3(a) of the Guidelines required the sentences in *Shewmaker* runn consecutively. The sentencing court in *Shewmaker* ignored § 5G1.3 and sentenced the defendant to concurrent time. The appellate court held the sentencing court erred in running the defendant's sentences concurrently where clearly Guideline provision § 5G1.3, required a consecutive sentence. However, the court's analysis in *Shewmaker*, provides guidance in the proper analysis in this case.

The sentencing court in *Shewmaker*, relying on *U.S. v. Willis*, 881 F.2d 823 (9th Cir. 1989), ruled Guideline § 5G1.3 is *ultra vires* because it is inconsistent with 18 U.S.C. § 3584(a). *Shewmaker*, rejects the reasoning in

Willis, supra, and harmonizes the interplay of 28 U.S.C. § 994(a)(1)(D), which delegates to the Sentencing Guideline commission the authority to promulgate Guidelines regarding concurrent and consecutive sentences, 28 U.S.C. § 994(b)(1), which requires the Guidelines be consistent with 18 U.S.C. § 3584(a), 18 U.S.C. 3584(b), and Guideline § 5G1.3(b) which mandates concurrent sentences in certain situations.

In *Shewmaker*, Guideline § 5G1.3, and § 3584(a) are reconcilable for two reasons, first, the particular guideline at issue may suggest circumstances or factors that, if present, may provide the basis for departure and second, the court retains discretion to depart subject to review, if it determines that factors relevant to the sentencing have not been adequately addressed by the Guidelines. *Shewmaker*, at 1127. *Shewmaker*, at 1128, describes 18 U.S.C. § 994(a)(1)(D) and Guideline § 5G1.3 are specific provisions qualifying or limiting the general provision by requiring the court depart pursuant to Guideline principles.

Applying *U.S. v. Shewmaker*, to the present sentencing clearly shows this court must follow the specific provision of Guideline § 5G1.3(b), and run the instant offense concurrent to the state charges. First, as argued above, it is beyond guestion the instant offense is the same criminal conduct, or different criminal transactions from the same criminal conduct. Second, the Presentence Report after a thorough investigation, identifies no basis for departure in the instant sentencing. (Paragraph 71, Part F. Factors That May Warrant Department). Neither does the Presentence Report indicate Orlenis Hernandez-Diaz impeded or obstructed justice, (Paragraph 16), or that he had either a mitigating or aggravating role in the offense.

CONCLUSION

The Memorandum by the Government ignores the Commentary Application Notes for § 5G1.3, caselaw analysis of § 5G1.3, the relevant conduct considered in the investigation, preparation and determination of the offense level in the Presentence Report, and the facts and history of this case. The caselaw is clear that the Court must first address the specific provision provided in the guidelines. If aggravating circumstances exists which were not adequately considered by the sentencing guidelines the Court has limited discretion to depart. The guidelines have adequately considered the circumstances that this case presents. Therefore, a departure is not warranted. The Defendant respectfully requests that a period of 33-41 months followed by five years be imposed, and that the sentence run concurrent to the state sentence.

Respectfully submitted,

/s/ ANGELA ARELLANES

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I hereby certify that a true
and correct copy of the foregoing pleading was mailed this
5th day of October, 1993, to Tom
English, Assistant U.S. Attorney,
and all counsel of record.

/s/ ANGELA ARELLANES

ANGELA ARELLANES

RECORD ON APPEAL

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. CR 92-236-JC

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LUIS LEON, ET AL., *Defendants-Appellants.*

From the United States District Court

For the District of New Mexico

TRANSCRIPT OF PROCEEDINGS

VOLUME VI

September 29, 1993

APPEARANCES

FOR THE PLAINTIFF:	Mr. Presiliano Torrez Assistant U.S. Attorney 625 Silver Avenue, SW Albuquerque, New Mexico 87102
FOR THE DEFENDANT GONZALES:	Mr. Edward Bustamante Attorney at Law 1412 Lomas Boulevard, NW Albuquerque, New Mexico 87102
ALSO PRESENT:	Mr. Juan Jose Pena Official Court Interpreter

(In Open Court.)

THE COURT: We're here in the matter of the *United States of America v. Miguel Gonzales*, Criminal Cause 92-236-JC. It comes before me for sentencing.

MR. BUSTAMANTE: Ed Bustamante for Miguel Gonzales, Judge, who appears in person.

THE COURT: I'm sorry? I didn't catch the rest of what you said.

MR. BUSTAMANTE: Mr. Gonzales appears in person, Judge. I'm sorry.

MR. TORREZ: Presiliano Torrez on behalf of the United States.

THE COURT: Have you had an opportunity to review the presentence report with your client?

MR. BUSTAMANTE: Yes.

THE COURT: Mr. Gonzales, have you reviewed the presentence report with your attorney, Mr. Bustamante?

THE DEFENDANT: Yes.

THE COURT: You may proceed.

MR. BUSTAMANTE: Judge, as to the facts in the presentence report, I do have one objection. I have an objection to the actual fact or to the assumption that they make, and that is, that Mr. Gonzales was present in the apartment when Officer Torres was confronted by the other codefendants with a handgun. I don't think the testimony in the case ever established that, and Detective Torres never established that Mr. Gonzales was present in the apartment when he was confronted with a handgun.

I object to paragraph 14, Judge, because it feeds directly into paragraph 23 which is part of the offense level computation, and I would object to the three-level increase. They are classifying him in a victim-related status.

I object on several grounds, Judge: First that clearly, under the facts of this case, the officers were successful in concealing their identity because this deal continued to go on and on, on the facts, for two days; and also, Judge, they justified it by saying that a conversation with Mr. Leon and Detective Torres justifies that all of the defendants were suspicious about these people being police.

If the Court will recall the testimony, Detective Torres and Mr. Leon had this conversation when they were alone in the car and they were driving around the neighborhood. There is no testimony about Luis Leon ever relating in conversation to any of the codefendants, especially Miguel Gonzales, Judge.

And as to the conversation itself, Detective Torres denies being a police officer, says he feels good about the deal and they continue this drug deal. So again, Judge, what we have here is the officers clearly concealing their identity until things do go awry, Judge.

On those bases, Judge, I would say that this does not warrant—the facts of the case, Judge, does not warrant a three-level increase as to Miguel Gonzales. I don't think it warrants an increase, Judge. In the language of 3A1.12b, in there it states that they must know or have reason to know and then disregard that knowledge, Judge. What they're stating is they might have known this person was a police officer or some kind of law enforcement officer and then try to disregard that knowledge and continue to assault them anyway.

And the evidence in this case, again, is that the assault had already taken place, Judge. What we have here is a successful undercover operation with some very bad results. It's not a case where defendants were deciding by force to take drugs from the Albuquerque Police Department.

Judge, that's all I have, Judge, as to the offense level computation.

Judge, I would ask the Court respectfully to run this concurrent with the state sentence under 5G1.13B. I've submitted two briefs to the Court. And I think, Judge, clearly that this is the same criminal conduct or criminal—different criminal transactions for the same conduct, and I think clearly under that guideline states that this sentence should run concurrent with the state sentence already imposed.

One other question I do have, Judge, and I do raise it with some trepidation, is that I would request the Court also include the 924(c) concurrent with the state sentence. And I state that, Judge, simply because I think that refers to the federal sentence, Judge, and I would request the Court do that also.

My last request, Your Honor, is that based again on 5G1.13B, that the Court adjust the sentence it's about to impose on the underlying conditions and not depart downward, Judge, but just reflect that Mr. Gonzales has been in federal custody physically for approximately about 330 days now, Judge, and—

THE COURT: I don't think I make that determination about whether he's in federal custody or not. The Bureau of Prisons does that. I really don't think that's a finding I can make.

MR. BUSTAMANTE: I guess the reason I raise that,

Judge, is because in the presentence report and in conversations with the presentence office, they are stating that he is not entitled to any federal credit even though he's been under a writ in federal custody for the past year and a half. So I guess what I'm asking the Court to do is reflect that he has been in that custody and not depart downward in any way, just reflect that he has been in federal custody and somehow reflect that it's 330 days and that that's consistent with 5G1.13.

Judge, to give an example of how the Court can adjust the sentence downwards—

THE COURT: Why does Judge Smith sentence him to I think it was 19 years and then put him on probation for six-and-a-half? How does that work?

MR. BUSTAMANTE: I think what the judge did was impose all 19 and a half years and suspend six and a half.

THE COURT: So—

MR. BUSTAMANTE: Why he did that, I don't know.

THE COURT: In the state system, how much time will he actually serve, assuming he has good behavior time?

MR. BUSTAMANTE: I think if he receives good behavior credit, he would probably serve roughly six and a half years, Judge, assuming he does receive good time credit. And I don't know if that's going to happen or not, Judge. A lot of things can happen to prisoners while they're in the state system or federal system.

THE COURT: Mr. Torrez.

MR. TORREZ: With respect to the request for state custody, I don't—I think that the Court has hit the nail on the head, that it's got to be a determination by the

Bureau of Prisons, because there have been instances when we've had to seek a writ to get him out of state custody. So I know the entire time hasn't been spent in federal custody. So I think that's better left to them.

With respect to the request for concurrent sentences, I would ask the Court to make a determination as to the base offense level and make the determination as to how much time the Court will sentence him with respect to the narcotics offense. And then the government would take the position that only as to that narcotics offense is the same conduct applicable. Thus, subsection B is applicable for only 18 months of that sentence.

Following the serving of that 18 months on a concurrent basis, I would ask the Court to make a finding that with respect to the other portions or the other offenses of conviction in state court, the robbery, conspiracy to commit armed robbery and the attempt to commit armed robbery, that those indeed are separate offenses and that the conduct required for 924(c) is separate and apart from that, that those—that the use of the gun is all that is necessary during the course of the commission of the narcotice offense.

Thereafter, when they actually take and steal the marijuana or make that effort consummating in the attempted robbery or the armed robbery of the narcotics, that is a separate offense and it's no longer the same conduct.

And therefore, subsection C ought to be applicable, and that portion of the sentence ought to be run consecutive, and that the gun charge, with respect to 924(c), that there is no discretion with respect to running the gun charge concurrent, that that has to be run consecutive.

THE COURT: What about his argument on the additional three points?

MR. TORREZ: With respect to that, on the basis that there was conversation at—we're at a different burden of proof with respect to sentencing. There was conversation—my recollection of the testimony is there was conversation between the players in a room adjacent that Detective Torres could hear where they were discussing whether or not he was indeed a police officer. It was at that point that one of them left and they went outside, two of them armed themselves and they took Detective Gloria or assaulted Detective Gloria.

During the course of that conduct or those conversation, in fact, it was discussed that the individual might be a police officer, and certainly, that can be the motive for trying to take Gloria and imprison him as well.

So I think the Court could make a finding that based upon the conversation, the evidence that was established at trial, that indeed, while there may not be actual knowledge that he was a police officer, they had reason to believe that he was a police officer. And the Court could make that finding.

THE COURT: I'm hard-pressed, Mr. Torrez, to—I know I can do it on a technical basis, just say that the robbery part that is prosecuted in the state court is one crime over here and what he was convicted of in federal court is another crime over here, but I'm hard-pressed to say that it's not basically all one conglomeration and he should not be sentenced on that basis. In other words, I don't want to—I'm not going to give him 18 months like you suggest in your brief concurrent and then run the rest of his federal sentence consecutive.

In a—in essence, it's like when you sentence some-

body off the reservation when they've already served time for exactly the same crime on the Indian reservation and they serve time again, and I'm having a hard time separating that out. I'm going to run his sentence consecutive.

MR. TORREZ: Okay. And—

THE COURT: It might be an interesting point for you to take up on appeal and see.

MR. TORREZ: We're not going to press it. Only it's our belief that it's not a same crime test but rather the conduct, and that the conduct had ended with respect to the 924(c), and then beyond that, the robbery occurs, when they actually take possession of the controlled substance. And—I understand the Court's dilemma.

THE COURT: I deny the defendant's request for the three-level reduction. There was certainly evidence during the trial that he knew or had reasonable cause to believe that he was dealing with police officers. And at sentencing, it's not beyond a reasonable doubt. So I would make that—actually, I think the jury, by their findings made it beyond a reasonable doubt.

Do you have anything you wish to say, Mr. Bustamante, before I impose sentence?

MR. BUSTAMANTE: No, Judge.

THE COURT: Mr. Gonzales, do you have anything you wish to say before I impose sentence?

THE DEFENDANT: No, Your Honor.

THE COURT: The Court adopts the factual findings and guideline applications in the presentence report and finds there is no need for an evidentiary hearing as there are no disputed facts.

The Court finds the offense level is 25 and the criminal history category XI, establishing a guideline imprisonment range of 57 to 71 months.

However, pursuant to Section 5G1.1C of the sentencing guidelines, the guideline must not be greater than any statutorily-required maximum sentence. Therefore, the guideline imprisonment range is 57 to 60 months.

The Court finds that pursuant to 18 United States Code Section 924(c)(1), the Count V is to run consecutive with any other sentence imposed. The Court takes judicial notice that the defendant was involved in a conspiracy to purchase marijuana which resulted in an armed robbery of 45 kilograms of marijuana.

In addition, two law enforcement officers were assaulted and one was restrained. The sentence imposed will reflect the sentencing goals of punishment, deterrence and the protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that as to Counts I and VI of the indictment, 92-236-JC, that the defendant, Miguel Gonzales, is hereby committed to the custody of the Bureau of Prisons to be in prison for a term of 60 months, said sentences to run concurrently one with the other, and pursuant to section 5G1.13B of the sentencing guidelines, concurrently with the State of New Mexico sentence for which he is currently confined.

As to Count V, the defendant is hereby committed to the custody of the Bureau of Prisons to be in prison for a term of 60 months, said sentence to run consecutively to the sentence imposed under Counts I and VI and consecutively to the State of New Mexico sentence for which he is currently confined.

Upon release from confinement, the defendant shall

be placed on supervised release for a term of three years as to each count, said terms to run concurrently one with the other.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U. S. Probation Office in the district to which he is released if the defendant is not deported.

If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U. S. Probation Office immediately to commence his term of supervised release.

Further, if the defendant is deportable, it is recommended that the Immigration & Naturalization Service initiate deportation proceedings prior to the defendant's release from custody.

While on supervised release, the defendant shall not commit any federal, state or local crime, shall not possess illegal controlled substances, shall comply with the standard conditionn of supervised release adopted by the Court on January 3, 1990 and the following special conditions:

The defendant shall not possess firearms, explosives or other dangerous weapons.

Based on the defendant's lack of financial resources, the Court will not impose a fine nor an additional fine which would pay government costs of any imprisonment or supervised release.

It is further ordered the defendant shall pay to the United States a special assessment of $50 as to each of the three accounts for a total of $150 which is due and payable to the Clerk of the United States District Court in Albuquerque.

The Court finds the defendant is a flight risk and a danger to the community and therefore voluntary surrender will not be granted.

Further, in accordance with Rule 32(a)2 of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten days.

Pursuant to 18 United States Code Section 3742, within ten days of the entry of judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission.

Pursuant to 28 United States Code Section 994 Subparagraph (1), you have the right to apply for leave to appeal *in forma pauperis* if you are unable to pay the costs of an appeal.

MR. BUSTAMANTE: Judge, I have one question, and that is that the Court reflect that the state sentence that this is run concurrent to is 91-770. Just place the docket number on the record.

THE COURT: I'm sorry, sir?

MR. BUSTAMANTE: Just that the Court place the docket number. And the state docket number is CR 91-770.

THE COURT: All right. It will run concurrently with CR-91-770.

MR. BUSTAMANTE: Thank you, Judge.

THE COURT: Be remanded to the United States Marshals to be delivered to the Penitentiary of New Mexico. We'll be in recess.

(THEREUPON, the proceedings were concluded.)

REPORTER'S CERTIFICATE

I, Cynthia C. Chapman, Certified Court Reporter for the United States, DO HEREBY CERTIFY that I reported the foregoing case in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter, and that the same is a true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND AND SEAL this 24th day of January, 1994.

/s/ CYNTHIA C. CHAPMAN
CYNTHIA C. CHAPMAN

RECORD ON APPEAL
UNITED STATES COURT OF APPEALS
Tenth Circuit

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LUIS LEON, ET AL., *Defendants-Appellants.*

From the United States District Court
For the District of New Mexico

TRANSCRIPT OF PROCEEDINGS
VOLUME V

October 6, 1993

FOR THE PLAINTIFF: MR. PRESILIANO TORREZ
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(In Open Court.)

THE COURT: Next matter is the *United States of America v. Orlenis Hernandez-Diaz*, Criminal Cause 92-236-JC.

MS. ARELLANES: Angela Arellanes for Mr. Hernandez-Diaz. Mr. Hernandez is present in the courtroom.

THE COURT: All right. Have you had an opportunity to review the presentence report with your client?

MS. ARELLANES: I have, Your Honor. A report has been provided to him as well.

THE COURT: Have you reviewed it with him?

MS. ARELLANES: And I have reviewed it, too.

THE COURT: All right. Mr. Hernandez, have you reviewed the presentence report with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything in the presentence report you want to call to my attention?

THE DEFENDANT: No, sir.

THE COURT: All right. Do you want to go over your objections to the presentence report with me?

MS. ARELLANES: Yes, Your Honor. First objection of course is the official victim objection for the reason that Mr. Hernandez-Diaz did not know that Detective Torres was a police officer. If he had known he was a police officer, he certainly would not have negotiated a drug deal, one, and two, he certainly would not have held Detective Torres hostage. Two, he learned of Detective Torres' official status after the fact, after everything had blown over. So I would ask the Court

not to increase the level for that adjustment.

I would ask the Court to impose a period of 33 months increased by five years for the gun count and, of course, the gun count would run consecutive to the 33 months. The reason I'm asking for a period of 33 months is because Mr. Hernandez-Diaz wished to plead. But for the fact that two of the codefendants refused to plead and but for the fact that the U.S. Attorney's Office has a policy regarding package deals, Mr. Hernandez-Diaz would have pled.

And so I would ask that the Court take that into consideration.

I ask the Court to run the gun counts—this sentence concurrent with the state sentence for the reason that a consecutive sentence, first of all, would be in violation of the double jeopardy clause. It would also fragment this Court's sentence. In essence, what would happen was that the 33 months, if the Court imposed 33 months, would start on today's sentence, and then Mr. Hernandez-Diaz would serve the balance of the state sentence, of which he is serving 14 and a half years, and then the gun count sentence would start. So essentially, there would be a gap in the sentence. And in order to avoid that, a concurrent sentence with all counts, I think, would cure that dilemma.

The other reason is because Mr. Hernandez-Diaz is serving multiple gun counts relating to the same guns in state court. He received four firearm enhancements for four separate charges relating to the same guns.

So I would ask the Court—and that essentially is the same offense. So I would ask the Court run the gun count concurrent with the gun counts that were imposed in state court.

Mr. Hernandez-Diaz, this is his first offense. He has learned very painfully, in a very severe manner that crime does not pay. There is more to life than fancy cars and nice clothes. And what's more—more than anything is his liberty. He understands that he has to pay for what he did. And he has paid dearly. He has paid severely. I would ask that the Court take that into consideration.

With regard to presentence confinement time, Mr. Hernandez-Diaz has been in custody in federal custody since June. He was previously in federal custody for a short period of time in October earlier before then, and it's in my presentence report the objections.

My understanding is that the Bureau of Prisons will credit the defendant based on the information on a cover sheet, and so I would ask the Court make a specific ruling regarding whether Mr. Hernandez-Diaz would get credit for the time that he's been in federal custody. With that in mind, I would ask the Court to impose 33 months followed by five years concurrent with the state sentence.

THE COURT: Well, I'm not sure I follow you on the cover sheet. My understanding of the Bureau of Prisons is they look into the entire time he's been in custody and where he's been, and they make a determination whether he gets credit on his federal sentence or not.

MS. ARELLANES: Your Honor, quite frankly, I just learned this this afternoon from Terry Storch. My understanding is that's the way it works. So—and apparently, there's a line of cases regarding tribal convictions where an Indian defendant is convicted in tribal court for the same offenses—he's convicted in federal court, and of course, he is credited towards that period of time that he was in tribal court towards the federal

conviction. And I think that line of cases would also apply over here.

THE COURT: I don't know whether that's exactly correct. Tribal court—you know, that's two separate jurisdictions. I take that into consideration sometimes when I sentence. But I don't think the tribal courts have to—I don't think they give credit—get credit specifically. Well, he's going to be serving enough time in the state, so it's not going to make any difference. The only thing you brought up that requires a factual determination that I can see is whether or not he knew he was a police officer.

There was ample testimony at the trial to show that it became known to some of the defendants that they were involved with a police officer when they bound and gagged him and put a gun to his head. So I'll give him the three points on that.

I don't think anything else you're arguing that needs a factual determination.

Do you have anything further you wish to say on behalf of your client before I impose sentence?

MS. ARELLANES: No, Your Honor.

THE COURT: Mr. Hernandez-Diaz, do you have anything you wish to say before I impose sentence?

THE DEFENDANT: No, thank you. My attorney has spoken for me.

THE COURT: The Court adopts the factual findings and guideline applications in the presentence report and finds there is no need for an evidentiary hearing as there are in disputed facts.

The Court finds the offense level is 25 and the criminal history category is I, establishing a guideline imprisonment range of 57 to 71 months.

However, pursuant to Section 5G1.1C of the sentencing guidelines, the sentence must not be greater than the statutory maximum sentence. Therefore, the guideline imprisonment range is 57 to 60 months.

The Court also finds that pursuant to 18 United States Code Section 924(c)(1), Count III is to run consecutive to any other sentence imposed.

The Court takes judicial notice that the defendant was involved in a conspiracy to purchase marijuana which resulted in the defendants' robbing an undercover agents of 45 kilograms of marijuana.

In addition, two law enforcement officers were assaulted and one was physically restrained by the defendant. The sentence imposed will reflect the sentencing goals of punishment, deterrence and the protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is judgment of the Court that as to Counts I and VI, that the indictment, 92-236-JC, that the defendant, Orlenis Hernandez-Diaz, is hereby committed to the custody of the Bureau of Prisons to be in prison for a term of 60 months, said sentences to run concurrently one with the other pursuant to Section 5G3b of the Sentencing Guidelines concurrently with the State of New Mexico sentence for which he is currently confined.

As to Count III, the defendant is hereby committed to the custody of the Bureau of Prisons for a term of five years, said sentence to run consecutively to the sentence imposed on Counts I and VI and consecutively to the State of New Mexico sentence for which he is currently confined.

Upon release from confinement, the defendant shall be placed in supervised release for a term of three years

as to each count, said terms to run concurrently one with the other.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U. S. Probation Office in the district to which he is released, if the defendant is not deported.

If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U. S. Probation Office immediately to commence his term of supervised release.

Further, if the defendant is deportable, it is recommended that the Immigration & Naturalization Service initiate deportation proceedings prior to the defendant's release from custody.

While on supervised release, the defendant shall not commit any federal, state or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990 and the following special conditions:

The defendant shall not possess firearms, explosives or other dangerous weapons.

Based on the defendant's lack of financial resources, the Court will not impose a fine nor an additional fine which would cover the government's cost of any imprisonment or supervised release.

It is further ordered the defendant shall pay to the United States a special assessment of $50 as to each Count I, III and VI for a total of $150, which is due and payable immediately to the Clerk of the United States District Court in Albuquerque.

Further, in accordance with Rule 32(a)2 of the

Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten days. Pursuant to 18 United States Code Section 3742, within ten days after the entry of the judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission.

Pursuant to 28 United States Code Section 994 Subparagraph (1), you have the right to apply for leave to appeal *in forma pauperis* if you are unable to pay the costs of an appeal.

Be remanded to the custody of the United States Marshals to be delivered to the State of New Mexico.

(THEREUPON, the proceedings were concluded.)

REPORTER'S CERTIFICATE

I, Cynthia C. Chapman, Certified Court Reporter for the United States, DO HEREBY CERTIFY that I reported the foregoing case in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter, and that the same is a true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND AND SEAL this 24th day of January, 1994.

/s/ CYNTHIA C. CHAPMAN

CYNTHIA C. CHAPMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
HONR. JOHN E. CONWAY, JUDGE PRESIDING

No. CR92-236-JC

UNITED STATES OF AMERICA, *Plaintiff,*

v.

MARIO PEREZ, ET AL., *Defendants.*

REPORTER'S TRANSCRIPT OF PROCEEDINGS
October 6, 1993

APPEARANCES

FOR THE PLAINTIFF: OFFICE OF THE U.S. ATTORNEY
625 Silver Ave., Southwest
Albuquerque, New Mexico
87102
BY: MR. DAVID WILLIAMS

FOR THE DEFENDANT: MR. ALBERTO ALBERTORIO
Attorney at Law
6229 Salt Cedar Road
Rio Rancho, New Mexico
87124

(In Open Court.)

THE COURT: Next matter is the *United States of America v. Mario Perez,* Criminal Cause Number 92-236-JC. All right, Mr. Albertorio. Have you had an opportunity to review the presentence report with your client?

MR. ALBERTORIO: Yes, Your Honor. May it please the Court, before we proceed, we would request that the courtroom be cleared of anyone who is not court personnel or a court officer in lieu of certain things that we want to bring to the attention of the Court.

I have discussed this matter with Pres Torrez, who Mr. Williams is standing in for him, and he had no objection. I also advised the Court and the Judge's personnel of that fact, and that is why my client is being sentenced at a separate time.

THE COURT: Well, all right. Let's clear the courtroom, then.

(Discussion held off the record.)

MR. ALBERTORIO: Thank you, Your Honor.

Your Honor, in response to the question, yes, I have had an opportunity to review the report with my client. He has read the report. The Court is aware that I filed objections to the conclusions of that report.

For purposes of brevity, in light of the Court's rulings on the codefendants who have raised similar objections, I will not go into any greater detail with regard to my motion, with the exception of one area, Your Honor.

I would like to point out—

THE COURT: Let me just ask your client something first. Mr. Perez, have you had an opportunity to discuss

the presentence report with your attorney?

THE DEFENDANT: Yes.

THE COURT: All right. Is there anything in the presentence report you want to call to my attention?

THE DEFENDANT: No, everything is okay.

THE COURT: All right. Mr. Albertorio.

MR. ALBERTORIO: Thank you, Your Honor. Just with regard to the area of acceptance of responsibility, the Court may recall that throughout the proceedings, we took the position that our client should be severed from the other defendants. And the Court may recall that I was principally involved with negotiations with the government with regard to a plea offer prior to trial.

When the government rested, there was a, as I recall, another plea offer which my client was prepared to accept, and I brought that to the attention of the Court, as well as one other codefendant. However, the government's position was, and apparently continues to be, that if this plea offer is not accepted by all defendants, that the government would not submit, if you will, or would not agree with the plea offer to one defendant.

And the Court may recall that, at the time, the Court raised the Court's concern that the government has always taken this posture. And if I may paraphrase, I believe the Court said that you didn't understand why they continue to take that position. The plea offer at that time would have been a plea of guilty to—guilty to the 924 exposing my client to a five-year term.

As a result of the government position, my client was therefore required to continue with the trial to try to present his defense and was subsequently prejudiced, in my view, with regard to the ultimate finding of guilty.

And now the potential exposure with regard to the recommendations of the report.

So I would urge the Court to take into consideration that there was a showing of acceptance of responsibility.

Now, while my client has not discussed any involvement with the probation officer in the preparation of this report, the reasons for that are that there may be an appeal. And if you subsequently want to take—give testimony at a subsequent trial, any discussions he may have had as a part of this presentence report may be used to impeach him. So I would urge the Court to give some consideration to the fact that there was at one time.

THE COURT: Do you have any case authority to back that up?

MR. ALBERTORIO: I don't have any case authority for that, Your Honor. But it seems to be the general understanding that there is that probability. These reports are part of the public record. There is no confidentiality that attaches to that. And it's my understanding that it's the general position from the defendants and defense counsel that if there is a potential appeal with a subsequent trial, that if there has been some type of admission, vis-a-vis acceptance of responsibility, and a person—and then the defendant takes the witness stand, certainly that could be an area that would be probed.

There might be a preliminary ruling, if defense counsel is aware that the government wishes to pursue that line, and we may get a Court ruling at that time. I have not had that experience. But it is the—was the concern of my client. So I would urge the Court to grant the two-level reduction and reduce the potential level of 25 to 23.

Of course, my initial motion, objections to the presentence report, had urged the Court to consider a level 20. That's all we have. In terms of the guidelines, we would urge sentencing at the lower end.

Now, there may be some other things that I would like to bring to the attention of the Court. And I can do that prior to your issuing of the sentence, or subsequently, if the Court would prefer.

THE COURT: Well, I'm not quite sure what it is you want to bring to my attention.

MR. ALBERTORIO: Well, for several months now, Your Honor, my client has been desirous of talking with the government. He believed that he can provide information of considerable proportions. The government has taken the position that they want to discuss this with my client. However, they've indicated that they would prefer that the sentence be issued prior to the discussions.

My concern, Your Honor, has been that if any of this information turns out to be of some value in preparing the entire scenario, if you will, for an ultimate conviction, etc., I suspect that that would exceed the one-year period, and therefore, my client would not have the benefit of coming before this Court for a reconsideration of sentencing.

We started negotiating early on so that some initial investigations would occur. I might point out to the Court that this information would not involve New Mexico. It would involve Florida, cartel participants, and it appears to be of great proportions. And it just seems to me, however swift the government may be, they will not be able to do that within one year. So—

THE COURT: No, I don't agree with you, sir. I think that my experience has been that if he can provide

worthwhile information, the government has been very prompt in filing 5K1s. And so I don't think that's a real concern. I understand the government position, that they want him sentenced to find out what he knows after that. So I don't think I need to hear any more.

MR. ALBERTORIO: I understand that. If we can have some assurances as to the 5K, again, the 5K—

THE COURT: He can't give you any assurances unless your client delivers something they can use.

MR. ALBERTORIO: I understand. But also, Your Honor, if I may, with all due respect, the 5K can ask for a modification, but the length of the modification is premised on how much information. And usually, that involves convictions, possibly providing testimony and the like. And certainly, we would like to see it done with all deliberate speed.

It just seems to me, if the prosecution is done here or in Florida or whatever, that the one year may, you know, may have already been passed. But I suspect that's academic. We're already here. I just wanted to bring it to the Court's attention.

THE COURT: I'm sure the U. S. Attorney, if he does have information, will act on it expeditiously.

MR. ALBERTORIO: Thank you, Your Honor.

THE COURT: Mr. Perez, do you have anything you wish to say before I impose sentence?

THE DEFENDANT: No, it's all right.

THE COURT: All right. The only evidentiary matter that you brought up, and you heard my rulings in the other two sentences, is there is ample testimony that the individuals knew you were dealing with police officers. And a three-level increase is warranted along with

a two-level increase to an offense level of 25.

The Court adopts the factual findings and guideline applications in the presentence report and finds there is no need for an evidentiary hearing as there are no disputed facts .

The Court finds the Offense Level is 15 and the criminal history category is III, establishing a guideline imprisonment range of 70 to 87 months.

The Court also finds that, pursuant to 18 United States Code 924(C)(1), Count II is to run consecutively to any other sentence imposed.

The Court takes judicial notice that the defendant has developed a pattern of criminal behavior revolving around drug distribution and violence.

In the instant offense, a law enforcement officer was restrained and threatened with his life as the defendant attempted to purchase 45 kilograms of marijuana without payment.

The sentence imposed will reflect the sentencing goals of punishment, deterrence and the protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that, as to Counts I and VI of the indictment, 92-236-JC, that the defendant, Mario Perez, is hereby committed to the custody of the Bureau of Prisons, to be in prison for a term of 87 months, said sentencing to run concurrently one with the other, and pursuant to 5G1.13B of the Sentencing Guidelines, concurrently with the State of New Mexico sentence for which he is currently confined.

As to Count II, the defendant is hereby committed to the custody of the Bureau of Prisons to be in prison for a

term of 60 months, said sentencing to run consecutively on the Counts I and VI and consecutively to the State of New Mexico sentence to which he is currently confined.

Upon release from confinement, the defendant shall be placed on supervised release for a term of three years as to each count, said terms to run concurrently one with the other.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U. S. Probation Office in the district to which he is released, if the defendant is not deported.

If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U. S. Probation Office immediately to commence his term of supervised release.

Further, if the defendant is deported, it is recommended that the Immigration & Naturalization Service initiate deportation proceedings prior to the defendant's release from custody.

While on supervised release, the defendant shall not commit any federal, state or local crime, shall not possess any illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special conditions:

The defendant shall not possess firearms, explosives or other dangerous weapons.

The defendant shall participate as directed in a program for substance abuse approved by the U. S. Probation Office, which may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

Based on the defendant's lack of financial resources, the Court will not impose a fine nor an additional fine which would pay government costs of any imprisonment or supervised release.

It is further ordered the defendant shall pay to the United States a special assessment of $50 each as to Counts I, II and VI, for a total of $150, which is payable to the United States District Court in Albuquerque immediately.

The Court finds the defendant is a flight risk and a danger to the community, and therefore, voluntary surrender will not be granted.

Further, in accordance with Rule 32(a)2 of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten days.

Pursuant to 18 United States Code Section 3742, within ten days of the entry of judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission.

Pursuant to 28 United States Code Section 994 subparagraph (1), you have the right to apply for leave to appeal *in forma pauperis*, if you are unable to pay the costs of an appeal.

You will be remanded to the custody of the United States Marshals and be delivered to the State of New Mexico.

MR. ALBERTORIO: Thank you very much, Your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Cynthia C. Chapman, Certified Court Reporter for the United States, DO HEREBY CERTIFY that I reported the foregoing case in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter, and that the same is a true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND AND SEAL this 3rd day of July, 1996.

/s/ CYNTHIA C. CHAPMAN

CYNTHIA C. CHAPMAN

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

v.

MIGUEL GONZALES

Name:	Miguel Gonzales
DOB:	February 18, 1963
SSN:	589-38-9962
Co. Reg.	Out of
To Vote	State
Mailing Address:	18471 41st Street North Loxahatchee, Florida 33410 (In custody, U.S. Marshal Service)
Residence Address:	18471 41st Street North Loxachatchee, Florida 33410

Edward Bustamante—Appointed
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

Filed: 10-14-93
__ guilty __nolo contendere as to count(s) _____
X not guilty as to counts 1, V and VI of Indictment 92-236JC filed on May 8, 1992

THERE WAS A:

__ finding X verdict of guilty as to count(s) I, V and VI of Indictment 92-236JC filed on May 8, 1992

__ As tried to the Court. X As tried before a jury.

THERE WAS A:

__ finding __ verdict of guilty as to count(s) _____

__ Judgment of acquittal as to count(s) _____

The defendant is acquired and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel. X Misd.__)

Conspiracy to Possess with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 846, and Aiding and Abetting, in violation of 18 USC 2, as charged in Count I; Carry or Use of a Firearm During or in Relation to A Drug Trafficking Crime, in violation of 18 USC 924(c)(1), 18 USC 924(a)(2), and Aiding and Abetting, in violation of 18 USC 2, as charged in Count V; Possession with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 841(a)(1) and 21 USC 841(b)(1)(D), as charged in Count VI, of Indictment 92-236JC filed on May 8, 1992.

The Court adopts the factual findings and guideline applications in the presentence report and finds that there is no need for an evidentiary hearing as there are no disputed facts.

The Court finds that the offense level is twenty-five (25) and the criminal history category is I, establishing a guideline imprisonment range of fifty-seven (57) to seventy-one (71) months. However, pursuant to Section 5G1.1(c) of the sentencing guidelines, any sentence imposed may not be greater than the statutorily required maximum sentence; therefore, the guideline imprisonment range is restricted to a range of fifty-

seven (57) to sixty (60) months. The Court also finds that pursuant to 18 U.S.C. § 924(c)(1), the sentence imposed on Count V shall run consecutively to any other sentence imposed. The Court takes judicial notice that the defendant was involved in a conspiracy to purchase marijuana which subsequently resulted in an armed robbery of the 45 kilograms of marijuana involved in the conspiracy. In addition, two law enforcement officers were assaulted and one was restrained. The sentence imposed will reflect the sentencing goals of punishment, deterrence, and protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984. it is the judgment of the Court as to each of Counts I and VI of Indictment 92-236JC, that the defendant, Miguel Gonzales, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months; said sentences to run concurrently, one with the other and, pursuant to 5G1.3(b) of the sentencing guidelines, concurrently with the State of New Mexico sentence for which the defendant is currently confined. As to Count V, the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months; said sentence is to run consecutively to the sentence imposed on Counts I and VI, and consecutively with the State of New Mexico sentence for which he is currently confined. Upon release from confinement, the defendant shall be placed on supervised release for a term of three (3) years as to each of Counts I, V and VI; said terms to run concurrently, one with the other. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U.S. Probation Office in the district to which he is released, if the defendant is not deported. If the defendant is deported and reenters the United States during the

period of supervised release, he is to report to the nearest U.S. Probation Office immediately to commence his term of supervised release. Further, if the defendant is deportable, it is recommended that the Immigration and Naturalization Service initiate deportation proceedings prior to the defendant's release from custody. While on supervised release, the defendant shall not commit any federal, state, or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special condition:

1) The defendant shall not possess firearms, explosives, or other dangerous weapons.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government costs of any imprisonment or supervised release.

The Court finds the defendant is a flight risk and a danger to the community; therefore, voluntary surrender shall not be granted.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) Refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) Associate only with law-abiding persons and main-

tain reasonable hours.

(3) Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes).

(4) Not leave the judicial district without permission of the probation officer.

(5) Notify your probation officer immediately of any changes in your place of residence.

(6) Follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special Assessment of $50.00 as to each of Counts I, V, and VI, for a total of $150.00, which shall be due immediately and payable by cashier's check, bank or postal money order to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount:_____
Amount Due: _____
Schedule of Payments: _____

Original Restitution Imposed: _____

Amount Due: _____
Payable To: _____

Schedule of Payments: _____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that count(s) _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the clerk of the Court deliver a certified copy of the judgment to the United States Marshal of this district.

__The Court orders commitment to the custody of the Bureau of Prisons and recommends:

September 30, 1993
Date of Imposition of Sentence

Signature of Judicial Officer

John E. Conway, United States District Judge
Name and Title of Judicial Officer

Date: October 12, 1993

In accordance with Rule 32(a)(2) of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten (10) days. Further, pursuant to 18 USC 3742, within ten (10) days of the entry of the judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal *in forma pauperis* if unable to pay the cost of an appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____to _____ at, _____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal Case.

_____

United States Marshal

BY: _____

Deputy Marshal

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW MEXICO

_____

UNITED STATES OF AMERICA

v.

ORLENIS HERNANDEZ-DIAZ

_____

Name:	Orlenis Hernandez-Diaz
DOB:	December 16, 1965
SSN:	592-96-8181
Co. Reg. To Vote	Santa Fe County
Mailing Address:	P.O. Box 1059 Santa Fe, New Mexico 87504-1059 (In custody, U.S. Marshal Service)
Residence Address:	P.O. Box 1059 Santa Fe, New Mexico 87504-1059

Angela Arellanes—Appointed Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

Filed: 10-20-93

__guilty __nolo contendere as to count(s)_____

X not guilty as to count(s) I, III and VI of Indictment 92-236JC filed on May 8, 1992

THERE WAS A:

__finding X verdict of guilty as to count(s) I, III and VI of Indictment 92-236JC filed on May 8, 1992

__As tried to the Court. X As tried before a jury.

THERE WAS A:

__finding __verdict of guilty as to count(s) _____

__Judgment of acquittal as to count(s) _____

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel. X Misd.__)

Conspiracy to Possess with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 846, and Aiding and Abetting, in violation of 18 USC 2, as charged in Count I; Carry or Use of a Firearm During or in Relation to A Drug Trafficking Crime, in violation of 18 USC 924(c)(1), 18 USC 924(a)(2), and Aiding and Abetting, in violation of 18 USC 2, as charged in Count III; Possession with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 841(a)(1) and 21 USC 841(b)(1)(D), as charged in Count VI, of Indictment 92-236JC filed on May 8, 1992.

The Court adopts the factual findings and guideline applications in the presentence report and finds that there is no need for an evidentiary hearing as there are no disputed facts.

The Court finds that the offense level is twenty-five (25) and the criminal history category is I, establishing a guideline imprisonment range of fifty-seven (57) to seventy-one (71) months. However, pursuant to Section 5G1.1(c) of the sentencing guidelines, the sentence must not be greater than the statutory maximum sentence; therefore, the guideline imprisonment range is fifty-seven (57) to sixty (60) months. The Court also finds

that pursuant to 18 U.S.C. § 924(c)(1), Count III is to run consecutively to any other sentence imposed. The Court takes judicial notice that the defendant was involved in a conspiracy to purchase marijuana which resulted in the defendants robbing the undercover agents of 45 kilograms of marijuana. In addition, two law enforcement officers were assaulted and one was physically restrained by the defendants. The sentence imposed will reflect the sentencing goals of punishment, deterrence, and protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to Counts I and VI of Indictment 92-236JC, that the defendant, Orlenis Hernandez-Diaz, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months, said sentences to run concurrently, one with the other, and, pursuant to 5G1.3(b) of the sentencing guidelines, concurrently with the State of New Mexico sentence for which he is currently confined. As to Count III, the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months, said sentence is to run consecutively to the sentence imposed on Counts I and VI and consecutively to the State of New Mexico sentence for which he is currently confined. Upon release from confinement, the defendant shall be placed on supervised release for a term of three (3) years as to each count, said terms to run concurrently, one with the other. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U.S. Probation Office in the district to which he is released, if the defendant is not deported. If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U.S. Probation Office immediately

to commence his term of supervised release. Further, if the defendant is deportable, it is recommended that the Immigration and Naturalization Service initiate deportation proceedings prior to the defendant's release from custody. While on supervised release, the defendant shall not commit any federal, state, or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special condition:

1) The defendant shall not possess firearms, explosives, or other dangerous weapons.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government costs of any imprisonment or supervised release.

The Court finds the defendant is a flight risk and a danger to the community; therefore, voluntary surrender shall not be granted.

The defendant shall be remanded to the custody of the U.S. Marshals to be returned to the State of New Mexico.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

v.

MARIO PEREZ

Name:	Mario Perez
DOB:	March 21, 1965
SSN:	592-44-9801
Co. Reg. To Vote	Santa Fe. County
Mailing Address:	P. O. Box 1059 Santa Fe, New Mexico 87504-1059 (In custody, U. S. Marshal Service)
Residence Address:	P. O. Box 1059 Santa Fe, New Mexico 87504-1059

Roberto Albertorio—Appointed Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

Filed: 10-20-93

__guilty __nolo contendere as to count(s) _____

X not guilty as to count(s) I, II and VI of Indictment 92-236JC filed on May 8, 1992

THERE WAS A:

__finding X verdict of guilty as to count(s) I, II and VI of Indictment 92-236JC filed on May 8, 1992

__As tried to the Court. X As tried before a jury.

THERE WAS A:

__finding __verdict of guilty as to count(s) _____

__Judgment of acquittal as to count(s) _____

The defendant is acquitted and discharged as to this/thes count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel. X Misd.__)

Conspiracy to Possess with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 846, and Aiding and Abetting, in violation of 18 USC 2, as charged in Count I; Carry or Use of a Firearm During or in Relation to a Drug Trafficking Crime, in violation of 18 USC 924(c)(1), 18 USC 924(a)(2), and Aiding and Abetting, in violation of 18 USC 2, as charged in Count II; Possession with Intent to Distribute less than 50 kilograms of Marijuana, in violation of 21 USC 841(a)(1) and 21 USC 841(b)(1)(D), as charged in Count VI, of Indictment 92-236JC filed on May 8, 1992.

The Court adopts the factual findings and guideline applications in the presentence report and finds that there is no need for an evidentiary hearing as there are no disputed facts.

The Court finds that the offense level is twenty-five (25) and the criminal history category is III, establishing a guideline imprisonment range of seventy (70) to eighty-seven (87) months. The Court also finds that pursuant to 18 U.S.C.§ 924(c)(1), Count II is to run consecutively to any other sentence imposed. The Court takes judicial notice that the defendant has developed a pattern of criminal behavior revolving around drug distribution and violence. In the instant offense, a law enforcement officer was restrained and threatened with his life as the defendant attempted to purchase 45 kilograms of

marijuana without payment. The sentence imposed will reflect the sentencing goals of punishment, deterrence, and protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to Counts I and VI of Indictment 92-236JC, that the defendant, Mario Perez, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of eighty-seven (87) months, said sentences to run concurrently, one with the other, and, pursuant to 5G1.3(b) of the sentencing guidelines, concurrently with the State of New Mexico sentence for which he is currently confined. As to Count II, the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty (60) months, said sentence is to run consecutively to the sentence imposed on Counts I and VI and consecutively to the State of New Mexico sentence for which he is currently confined. Upon release from confinement, the defendant shall be placed on supervised release for a term of three (3) years as to each count, said terms to run concurrently, one with the other. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U.S. Probation Office in the district to which he is released, if the defendant is not deported. If the defendant is deported and reenters the United States during the period of supervised release, he is to report to the nearest U.S. Probation Office immediately to commence his term of supervised release. Further, if the defendant is deportable, it is recommended that the Immigration and Naturalization Service initiate deportation proceedings prior to the defendant's release from custody. While on supervised release, the defendant shall not commit any federal, state, or local crime, shall not possess illegal controlled substances, shall comply

with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special conditions:

1) The defendant shall not possess firearms, explosives, or other dangerous weapons.

2) The defendant shall participate as directed in a program for substance abuse approved by the U.S. Probation Office, which may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government costs of any imprisonment or supervised release.

The Court finds the defendant is a flight risk and a danger to the community; therefore, voluntary surrender shall not be granted.

The defendant shall be remanded to the custody of the U.S. Marshals for service of sentence.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) Refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) Associate only with law-abiding persons and maintain reasonable hours.

(3) Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability.

(When out of work notify your probation officer at once, and consult him prior to job changes).

(4) Not leave the judicial district without permission of the probation officer.

(5) Notify your probation officer immediately of any changes in your place of residence.

(6) Follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special Assessment of $50.00 as to each of Counts I, III and VI, for a total of $150.00, which shall be due immediately and payable by cashier's check, bank or postal money order to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount: _____

Amount Due: _____

Schedule of Payments: _____

Original Restitution Imposed: _____

Amount Due:_____

Payable To: _____

Schedule of Payments: _____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that count(s) _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the clerk of the Court deliver a certified copy of the judgment to the United States Marshal of this district.

__The Court orders commitment to the custody of the Bureau of Prisons and reconunends:

October 6, 1993
Date of Imposition of Sentence

_____
Signature of Judicial Officer

John E. Conway, United States District Judge
Name and Title of Judicial Officer

Date: October 18, 1993

In accordance with Rule 32(a)(2) of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten (10) days. Further, pursuant to 18 USC 3742, within ten (10) days of the entry of the judgment, you have the right to appeal the final sentence of this Court imposed on an offense for

which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal *in forma pauperis* if unable to pay the cost of an appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at, _____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marhsal

BY: _____

Deputy Marshal

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) Refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a lawenforcement officer.

(2) Associate only with law-abiding persons and maintain reasonable hours.

(3) Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability.

(When out of work notify your probation officer at once, and consult him prior to job changes).

(4) Not leave the judicial district without permission of the probation officer.

(5) Notify your probation officer immediately of any changes in your place of residence.

(6) Follow the probation offcer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special Assessment of $50.00 as to each of Counts I, II and VI, for a total of $150.00, which shall be due immediately and payable by cashier's check, bank or postal money order to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount: _____
Amount Due: _____
Schedule of Payments: _____

Original Restitution Imposed: _____
Amount Due: _____
Payable To: _____

Schedule of Payments: _____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that count(s) _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the clerk of the Court deliver a certified copy of the judgment to the United States Marshal of this district.

__The Court orders commitment to the custody of the Bureau of Prisons and recommends:

October 6, 1993
Date of Imposition of Sentence

_____
Signature of Judicial Officer

John E. Conway, United States District Judge
Name and Title of Judicial Officer

Date: October 18, 1993

In accordance with Rule 32(a)(2) of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten (10) days. Further, pursuant to 18 USC 3742, within ten (10) days of the entry of the judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal *in forma pau-*

peris if unable to pay the cost of an appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By: _____
Deputy Marshal

UNITED STATES v. GONZALES, MIGUEL, ET AL.

95-1605

Supreme Court of the United States

Monday, June 17, 1996

The motion of respondent Miguel Gonzales for leave to proceed in forma pauperis is granted. The motion of respondent Orlenis Hernandez-Diaz for leave to proceed in forma pauperis is granted. The motion of respondent Mario Perez for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

(6)

No. 95-1605

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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33 pp

QUESTION PRESENTED

Section 924(c) of Title 18 requires mandatory terms of imprisonment for defendants who use or carry firearms during and in relation to certain narcotics or violent offenses, and it provides that "[n]otwithstanding any other provision of law" those prison terms "shall [not] run concurrently with any other terms of imprisonment." The question presented in this case is whether a court may order that a sentence imposed under Section 924(c) is to run concurrently with a state-law sentence that the defendant is already serving.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1605

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 65 F.3d 814.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1995. A petition for rehearing was denied on December 7, 1995. Pet. App. 21a-22a. On February 27, 1996, Justice Breyer extended the time for filing a petition for a writ of certiorari to and including April 5, 1996. The petition for a writ of certiorari was filed on April 4, 1996, and was granted by the Court on June 17, 1996. J.A. 159. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun or semi-automatic assault weapon to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, respondents were convicted of conspiracy to possess and distribute marijuana, in violation of 21 U.S.C. 846; possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841; and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Respondents received sentences ranging from 120 to 147 months' imprisonment, of which 60 months reflected the mandatory sentence required by 18 U.S.C. 924(c). The court of appeals reversed respondents' convictions for possessing marijuana and vacated their sentences. Pet. App. 1a-20a.

1. Undercover officers with the Albuquerque, New Mexico, Police Department, posing as drug dealers, arranged to sell 100 pounds of marijuana to respondents and their co-conspirator Luis Leon for $60,000. A 35-pound bale of marijuana, which was used as bait, was placed in the trunk of an undercover vehicle and shown to respondents Gonzales and Hernandez-Diaz and to Luis Leon. Pet. App. 2a.

On the day of the sale, Leon and respondent Gonzales met with undercover officers in a parking lot adjoining Leon's apartment, where they once again viewed the bait marijuana. Leon then took one of the officers into his apartment, ostensibly to consummate the sale. Once in the apartment, however, the officer was held up at gun point by respondent Hernandez-Diaz, who apparently intended to take the marijuana without paying for it. Respondent Perez, who was also in the apartment, helped Hernandez-Diaz by patting the officer down and taking his weapon. After

the officer was disarmed, he was bound and gagged. Pet. App. 2a-4a.

Respondent Gonzales had remained in the parking lot with a second undercover officer. While the first officer was being held up in the apartment, Gonzales pulled a gun on the second officer, took the officer's firearm, and ordered him to accompany Gonzales into the apartment. At that time, a siren sounded. Gonzales fled the area. Several officers ran up the stairs to Leon's apartment, kicked the door open, and rescued the first undercover officer. Pet. App. 4a-5a.

2. Respondents were convicted in state court on charges arising out of the hold up of the two undercover officers. See Gov't Pet. for Reh'g 2.[1] While they were serving those sentences, respondents and Leon were convicted in federal court of narcotics conspiracy and substantive offenses (21 U.S.C. 846, 841) and of using a firearm during and in relation to a drug trafficking crime (18 U.S.C. 924(c)). Respondents received sentences ranging from 120 to 147 months' imprisonment, of which 60 months reflected the mandatory sentence required by 18 U.S.C. 924(c). The district court ordered so much of the new federal sentences as was attributable to the narcotics offenses to run concurrently with the state sentences. The court ordered, however, each 60-month sentence under 18 U.S.C. 924(c) to run consecutively to the state sentence that the defendant was serving. J.A. 115, 125, 134-135.

3. The court of appeals vacated the district court's order that the sentences under Section 924(c) be served consecutively to the state sentences.[2] The court held that a sentencing court may order the five-year prison term required by Section 924(c) to run concurrently with a state-law sentence that the defendant is already serving. The court acknowledged that Section 924(c) provides that the sentence imposed under that statute shall not run concurrently "with any other term of imprisonment." Pet. App. 12a. The court also acknowledged that "every circuit to have considered the issue has held that [Section] 924(c)'s plain language prohibits sentences imposed under that statute from running concurrently with state sentences." *Id.* at 10a. The court believed, however, that a different outcome was warranted by the canon that "courts will adopt a more sensible statutory construction" when "a literal reading of the statutory language would produce an absurd result." *Id.* at 11a.

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[1] Leon also was prosecuted by the State of New Mexico, but his trial ended in a mistrial on the most serious charges. He was convicted only of possession of a controlled substance. Although he was serving an 18-month sentence for that state offense at the time he was sentenced for the federal offenses, and although his sentence under 18 U.S.C. 924(c) was ordered to run consecutively to that state-law sentence, he did not appeal the consecutivity feature of his Section 924(c) sentence. Accordingly, Leon's sentence under Section 924(c) was not changed by the court of appeals' decision under review. See Pet. App. 9a-15a; see also L. Leon Presentence Investigation Report ¶ 30 (July 16, 1993).

[2] The court of appeals also reversed respondents' substantive drug convictions and vacated their sentences. Pet. App. 6a-9a, 20a. The court concluded that respondents could not properly be convicted of possessing the marijuana with the intent to distribute it, because the undercover officers never actually relinquished control over the drugs. *Id.* at 8a-9a. The court further set aside several enhancements imposed by the district court under the Sentencing Guidelines. *Id.* at 7a-9a, 18a-19a. We have not challenged those rulings here.

The court of appeals did not expressly identify the specific "absurd result" that would result from applying the statutory language faithfully, Pet. App. 11a-12a. It suggested, however, that the absurdity resulted from the fact that "an all-inclusive reading of 'any other term of imprisonment' * * * would more than double the custodial price that Congress and the Guidelines have set for committing the total criminal conduct engaged in by" respondents. *Id.* at 15a. As a result of that perceived anomaly, *ibid.*, the court focused on two aspects of Section 924(c) that it believed raised a doubt about whether Congress used the phrase "any other term of imprisonment" in its "most literal[]" sense. *Id.* at 12a. First, the court noted that Section 924(c) is a "federal statute, with presumed concern for the treatment of federal crimes." *Ibid.* Second, the court found it significant that Congress used "a roundabout locution" to "negate[] the imposition of a concurrent sentence, rather than to employ more conventional and straightforward declaratory language to require [a] consecutive sentence[]." *Id.* at 12a-13a.

Because the court believed that those two features of the statute created an ambiguity about what Congress intended, it examined the Senate Committee Report that accompanied the 1984 amendments to Section 924(c), which, *inter alia*, made changes to the provision forbidding a concurrent sentence. That report reflected, among other things, the Committee's "inten[tion] that the mandatory sentence [under Section 924(c)] be served prior to the start of the sentence for the underlying or any other offense." S. Rep. No. 225, 98th Cong., 1st Sess. 313-314 (1983). The court concluded that, in order to give effect to that intent, the phrase "any other term of imprisonment" must be interpreted to exclude a state sen-

tence that the defendant is already serving. The court explained that "if a defendant is sentenced in state court first, there is no way in which a later-sentencing federal court can cause the mandatory five-year [Section] 924(c) sentence to be served before a state sentence that is already being served." Pet. App. 16a. The court also found its conclusion "entirely consistent" with Sentencing Guidelines § 5G1.3, which generally provides for a concurrent sentence when a defendant has previously been prosecuted in state court for the events that gave rise to his federal conviction. Pet. App. 16a-17a.

SUMMARY OF ARGUMENT

A. Section 924(c) provides that "[n]otwithstanding any other provision of law, the court shall not" run "the term of imprisonment imposed under this subsection * * * concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." When construed according to its ordinary meaning, that language clearly prohibits a sentence that is to run concurrently with "any" sentence imposed on the defendant, including a sentence imposed for a state crime. For two reasons, that conclusion draws strong additional support from the context in which the prohibition on concurrent sentences appears.

First, the first sentence of Section 924(c) also uses the inclusive word "any" to refer to certain crimes, but then expressly qualifies that reference to limit it to federal offenses. Similarly, other provisions of Section 924 indicate that Congress knew well how to specify whether a particular provision relates to state

or federal matters. Second, by expressly prohibiting a concurrent sentence "[n]otwithstanding any other provision of law," Congress made plain its intent to displace the federal statute that ordinarily would authorize such a sentence, see 18 U.S.C. 3584(a), and the Sentencing Guidelines provisions that implement that statute, see Guidelines § 5G1.3.

There is no basis for overriding the text of Section 924(c) with a presumption that a federal sentencing statute would be concerned only with whether a federal sentence ran consecutively to another federal sentence, and would have no concern with whether the sentence ran consecutively to a state sentence that the defendant is already serving. Congress is well aware that the punishment of crimes is primarily the province of the States. The legislature, therefore, would have understood that the bulk of conduct covered by Section 924(c)—using or carrying a firearm in furtherance of violent and narcotics offenses—would also be covered by state criminal law, and that many defendants convicted under Section 924(c) would also be sentenced under state law for related offenses.

B. In light of the clarity of the statutory language, recourse to legislative history is unnecessary. In any event, the legislative history of Section 924(c) does not support the Tenth Circuit's conclusion. Section 924(c) was enacted in 1968. A narrow prohibition on concurrent sentences (forbidding only sentences that would be concurrent with any sentence imposed for the underlying felony) was first added to the statute in 1970. Although the 1970 amendment used the same "roundabout locution" to forbid a concurrent sentence that caused the Tenth Circuit to doubt whether Congress intended to require a consecutive sentence, the sponsor of that amendment and

the Senate Committee Report that accompanied it made clear that consecutivity was precisely what was intended.

Congress significantly broadened the original prohibition on concurrent sentences in 1984, when it expanded its focus from the sentence imposed for the underlying felony to its current focus on "any other" sentence that the defendant might receive, "including" that imposed for the underlying predicate crime. The Senate Committee Report that accompanied the 1984 amendment describes the change as precluding a sentence concurrent with a defendant's sentence "for any other crime"—a formulation that strongly confirms the unqualified language used in the statute itself.

In reaching a contrary conclusion, the Tenth Circuit relied on a different passage in the 1984 Senate Committee Report that reflected an expectation that sentences under Section 924(c) would be served before any other sentence, and it reasoned that such an "intention" cannot be given effect with respect to a state-law sentence that the defendant has already begun to serve. The same reasoning, however, would apply to any federal sentence that a defendant is already serving; the result would be that Section 924(c)'s prohibition would ordinarily apply only to sentences imposed for the predicate offenses, despite Congress's intent to forbid concurrency with "any other" sentence "*including*" that imposed for the predicate offense. More fundamentally, the Tenth Circuit erred in giving the force of law to a statement in the committee report that does not purport to explain any language in the statute.

C. Neither the rule of lenity nor the rule that statutes should be construed so as to avoid absurd results supports the conclusion reached by the Tenth Circuit. The rule of lenity comes into play only in cases of grievous ambiguity about a statute's meaning. It is inapplicable where, as here, the statutory language is clear. Moreover, there is nothing "absurd" in requiring lengthy terms of incarceration for defendants who use firearms in the commission of dangerous felonies and who are already subject to other prison sentences.

ARGUMENT

SECTION 924(c) FORBIDS THE IMPOSITION OF A SENTENCE THAT WILL RUN "CONCURRENTLY WITH ANY OTHER TERM OF IMPRISONMENT," IRRESPECTIVE OF WHETHER THE "OTHER TERM OF IMPRISONMENT" IS IMPOSED UNDER STATE OR FEDERAL LAW

Section 924(c) of Title 18 requires mandatory jail sentences for anyone who uses or carries a firearm during and in relation to a crime of violence or a drug trafficking crime; those mandatory sentences range from five years' to life imprisonment, depending on the type of firearm that the defendant used or carried and on the defendant's criminal history. The statute further provides that "[n]otwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." 18 U.S.C. 924(c).

The question in this case is whether a district court has authority to order a sentence under Section 924(c) to run concurrently with a state term of imprisonment that the defendant is already serving. The Tenth Circuit concluded that the statutory prohibition of a concurrent sentence should not be read "literally," but must instead be interpreted to exclude a state prison sentence. For the reasons set forth below, that conclusion is inconsistent with both the plain language and history of Section 924(c), and it should accordingly be rejected.

A. Congress Used Expansive And Unqualified Language To Forbid A Sentence That Is Concurrent To "Any Other Term Of Imprisonment"

1. In determining the meaning of a statute, the inquiry must begin with the "ordinary meaning" of the language chosen by Congress. See, *e.g.*, *Moskal* v. *United States*, 498 U.S. 103, 108-109 (1990). The Court has repeatedly invoked that principle in its cases under Section 924(c). See *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993); see also *Deal* v. *United States*, 113 S. Ct. 1993, 1997-1999 (1993); *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995).[3]

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[3] In *Bailey*, this Court held that the verb "uses" in Section 924(c) requires proof of "active employment of a firearm." 116 S. Ct. at 508. Respondents did not challenge their Section 924(c) convictions in the court of appeals, Pet. App. 9a, or at the petition stage in this Court. As we pointed out in the petition (Pet. 8 n.3), the sufficiency of the evidence to support those convictions is not affected by *Bailey*, *supra*, since there is no question that respondents "actively" used firearms during and in relation to the narcotics conspiracy. While the jury instructions did not incorporate the "active use" concept elucidated by *Bailey*, respondents did not object on that

The language of Section 924(c) is dispositive in this case, "for where, as here, the statutory language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917); accord *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2147 (1995).

Section 924(c) expressly forbids the imposition of a sentence that is concurrent to "*any* other term of imprisonment." 18 U.S.C. 924(c)(1) (emphasis added). As this Court has frequently remarked, the ordinary understanding of the inclusive word "any" is "broad" (*NAACP* v. *New York*, 413 U.S. 345, 353 (1973)) and "expansive" (*Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980)). The term "any" imports "no restriction" (*United States* v. *Turkette*, 452 U.S. 576, 580 (1981)) or "limit[ation]" (*International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *Shea* v. *Vialpando*, 416 U.S. 251, 260 (1974)), and accordingly it ordinarily "leaves no doubt as to the Congressional intention to include all" members of the category identified by the enactment (*United States* v. *Rosenwasser*, 323 U.S. 360, 363 (1945)). By using that expansive term in Section 924(c), Congress manifested its intent to reach the totality of "other term[s] of imprisonment," including state terms of imprisonment, that a defendant convicted under Section 924(c) might be serving. Compare

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ground in district court and have not done so in any appellate court, including this one. As we noted in the petition, any error in the jury instructions in this case would not afford relief if raised for the first time on appeal.

United States v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1604 (1994) (statute that refers to an arrest made by "any law enforcement officer" includes "federal, state, or local" officers); *The Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1870) (statute forbidding filing suit "in any court" makes it "quite clear that it includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense").[4]

2. The Tenth Circuit's conclusion that the phrase "any other term of imprisonment" should be read as if it stated "any other *federal* term of imprison-

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[4] Respondent Hernandez-Diaz contended at the petition stage (Br. in Opp. 4-5) that *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599 (1994), supports the Tenth Circuit's holding, because that case interpreted the phrase "arrest * * * [by] any law-enforcement officer" in 18 U.S.C. 3501(c) to refer only to arrests effected for violations of federal law. That contention is incorrect. *Alvarez-Sanchez* specifically held, relying on the plain meaning of the word "any," that the phrase "any * * * officer" includes "federal, state, or local" officers. 114 S. Ct. at 1604. The Court's conclusion that Section 3501(c) refers only to arrests for violations of federal law relied solely on another feature of that statute—*i.e.*, the statute's textual concern with "delay" in bringing an accused before a judge authorized to grant or deny bail for "offenses against the laws of the United States or of the District of Columbia." 18 U.S.C. 3501(c); *Alvarez-Sanchez*, 114 S. Ct. 1603-1604. The Court explained that such "delay" cannot occur until there is a "duty" to present a person to a federal magistrate, and that the "delay" covered by Section 3501(c) therefore requires an arrest for a federal crime. 114 S. Ct. at 1604. No similar contextual limitation on the phrase "any other term of imprisonment" justifies imposing a "federal crime" gloss on the last sentence of Section 924(c).

ment" is not supported by that court's view that Section 924(c) "is a federal statute, with presumed concern for the treatment of federal crimes." Pet. App. 12a. Section 924(c) unquestionably defines a federal crime and it prescribes a federal sentence for that crime. But it does not follow that it can also be "presumed" that Congress, in forbidding that federal sentence from running concurrently with "any other" sentence, meant to exclude state sentences from the broad sweep of that prohibition. As the Seventh Circuit noted in rejecting the Tenth Circuit's reasoning, there are simply no cases from this Court "announcing [as] a canon of construction" the "proposition that a federal statute might be presumed to deal with solely federal subjects." *United States* v. *Thomas*, 77 F.3d 989, 990-991 (1996).

Such a canon would be a particularly poor guide to Congress's intent in enacting federal criminal statutes. Congress "is predominantly a lawyers' body" that is familiar with "the commonplaces of our law." *Callanan* v. *United States*, 364 U.S. 587, 594 (1961). That includes the fact that "States possess primary authority for defining and enforcing the criminal law," *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1720 (1993), and that, when federal law punishes the same conduct as is made criminal by state law, it is perfectly permissible for both sovereigns to prosecute and punish the offender cumulatively, see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187 (1959). Congress could not have failed to understand that the bulk of conduct covered by Section 924(c)—using or carrying a firearm in furtherance of violent and narcotics offenses—would also be covered by, and would be frequently prosecuted under, state criminal statutes. In broadly

prohibiting sentences under Section 924(c) from running concurrently with "any other" sentence that the defendant might be serving, Congress necessarily intended to preclude concurrency with any sentence previously imposed by State authorities for related conduct.

3. Apart from being foreclosed by Section 924(c)'s broad language prohibiting "any" concurrent sentence, the Tenth Circuit's analysis cannot be reconciled with the context in which that language appears. Two features of the statutory context show that Congress meant to forbid concurrent sentences with state as well as federal crimes.

First, the first sentence of Section 924(c) demonstrates that Congress was well aware of the breadth that the word "any" would have in the sentencing provision at issue here. The first sentence of Section 924(c), like the provision at issue in this case, also uses the word "any"; it does so to refer to the predicate narcotics and violent crimes that trigger application of Section 924(c). The first sentence, however, makes clear that the statute does not reach using or carrying a firearm during a state-law violation. It provides that a narcotics or violent crime qualifies as a predicate offense only if the defendant "may be prosecuted [for it] in a court of the United States"—*i.e.*, only if it is a federal crime. The fact that Congress, in another sentence of the same subsection, expressly limited the broad sweep of the phrase "any crime" to federal crimes is a telling indication that it did not intend to restrict the provision at issue here in the same manner. See, *e.g.*, *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994). Indeed, as

the Seventh Circuit noted in *Thomas*, other subsections of Section 924 demonstrate that Congress is "perfectly capable * * * of specifying that a provision relates to state or federal matters." 77 F.3d at 991 (citing 18 U.S.C. 924(g)). Compare *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994) (when qualifying language is absent in one statute but is present in related statutes, "Congress' silence * * * speaks volumes"); *Patterson* v. *Shumate*, 504 U.S. 753, 758 (1992) (unqualified reference to "applicable * * * law" must be read as encompassing both federal and state law, rather than state law alone, since "Congress, when it desired to do so, knew how to restrict the scope of applicable law to 'state law' and did so with some frequency [in the same statute]").

Second, Section 924(c) forbids a concurrent sentence "[n]otwithstanding any other provision of law." A district court ordinarily has discretion to provide for a concurrent or consecutive sentence by virtue of a federal statute, see 18 U.S.C. 3584(a), and the Sentencing Guidelines provision that implements that statute, see Guidelines § 5G1.3; see also *id.* at Background. Congress was aware that district courts could use their statutory discretion under Section 3584(a) to make a new federal sentence concurrent with a state sentence that the defendant was already serving. See S. Rep. No. 225, 98th Cong., 1st Sess. 129 (1983). By forbidding any concurrent sentence "[n]otwithstanding any other provision of law," Section 924(c) makes "clear beyond peradventure" (*Cisneros* v. *Alpine Ridge Group*, 113 S. Ct. 1898, 1903 (1993)) Congress's intent to displace the source of legal authority that ordinarily would

authorize such a sentence—*i.e.*, Section 3584(a) and its implementing Guideline.[5]

4. Finally, the court of appeals' analysis cannot logically be confined to prisoners serving state sentences. The Tenth Circuit determined, without any support in the statutory language, that Congress's "stated intent" was that a Section 924(c) sentence must be served before any other sentence, and it assumed that such "intent" should inform the meaning that courts will give to Section 924(c)'s prohibition on a concurrent sentence. Pet. App. 16a. The court then reasoned that Section 924(c) sentences may be made concurrent with "a state sentence that is already being served," *ibid.*, because in those cases it is not possible to comply with Congress's purported intent that the Section 924(c) sentence be served first. Yet the same reasoning would also lead to the conclusion that a new Section 924(c) sentence may run concurrently with any *federal* sentence that the defendant is already serving, because under 18 U.S.C. 3585(a) no federal sentence may commence before

[5] Indeed, if the Tenth Circuit applied to Section 3584(a) the same interpretive principles that it crafted for Section 924(c), it would have been compelled to conclude that a district court has no authority to run a federal sentence concurrently with a state sentence. Section 3584(a) gives the district court authority to impose a federal sentence that will run concurrently to "an undischarged term of imprisonment," without specifying that such "term[s] of imprisonment" include state sentences. The Tenth Circuit did not explain, nor is it apparent, why it is reasonable to "presume[]" (Pet. App. 12a) that Section 924(c)'s prohibition of concurrent sentences does not embrace state sentences, but that Section 3584(a)'s equally unqualified authorization of concurrent sentences does embrace such state sentences.

the date it is imposed.[6] The logical result of the Tenth Circuit's analysis, therefore, is that Section 924(c) sentences can run consecutively to "any other" sentences only if those sentences are imposed at the same time when the defendant is sentenced for the Section 924(c) offense—which would typically limit the statute's consecutivity feature to the underlying narcotics or violent crime. Such a result cannot be reconciled with Section 924(c)'s prohibition of a sentence that is concurrent "with any other term of imprisonment *including* that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." Compare *Federal Land*

[6] Section 3585, which governs when a federal sentence is deemed to "commence" and whether any credit should be awarded to a defendant for any other time spent in custody, see generally *United States* v. *Wilson*, 503 U.S. 329 (1992), is a limit on the district court's authority under 18 U.S.C. 3584 to provide for a sentence that is fully concurrent. It has long been the rule under Section 3585's predecessor statute that a federal sentence cannot commence before the date of imposition, and thus that a federal sentence can be made concurrent only with *the remainder* of any sentence that the defendant may already be serving. See, *e.g.*, *Shelvy* v. *Whitfield*, 718 F.2d 441, 444 (D.C. Cir. 1983) (per R.B. Ginsburg & Scalia, JJ.); *United States* v. *Flores*, 616 F.2d 840, 841 (5th Cir. 1980). The Bureau of Prisons, which is the agency charged with administering Section 3585, see *Reno* v. *Koray*, 115 S. Ct. 2021, 2026-2027 (1995) (noting that Bureau's views are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)), has taken the same view under Section 3585. See Federal Bureau of Prisons, *Sentence Computation Manual CCCA*, Program Statement 5880.28, at 1-13 (1992 & Supp. 1994) ("In no case can a federal sentence of imprisonment commence earlier than the date on which it was imposed").

Bank v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941).

B. The Legislative History Of Section 924(c) Provides No Support For A Construction Of The Statute That Would Limit Its Prohibition On Concurrent Sentences

Because the language of Section 924(c) unambiguously answers the question presented by this case, there is no need to consult the legislative history for further guidance as to the statute's meaning. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). In any event, however, to the extent that it sheds light on the question at all, the legislative history fails to support the interpretation of the statute adopted by the court below.

1. As originally enacted in 1968, Section 924(c) imposed mandatory sentences on anyone who "(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States" or "(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States." The statute had its genesis as a floor amendment, sponsored by Representative Poff, to H.R. 17735, 90th Cong., 2d Sess. (1968), then known as the State Firearms Control Assistance Act of 1968. 114 Cong. Rec. 22,231 (1968); see *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978). Although the Poff amendment would have prohibited the imposition of a concurrent sentence, and the amendment was initially passed by the House in that form, see 114 Cong. Rec. 22,229, 22,248, a conference committee deleted that prohibition altogether. See H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968).[7]

[7] Representative Poff's amendment also would have prohibited probation or a suspended sentence; the conference com-

The conference committee's version of Section 924(c) was ultimately accepted by the House (114 Cong. Rec. 30,587 (1968)) and the Senate (*id.* at 30,183).[8]

Congress returned to Section 924(c) in 1970, when it amended the statute to "reimpos[e] the restriction that no sentence under that section could be served concurrently with any term imposed for the underlying felony." *Simpson* v. *United States*, 435 U.S. at 14 n.9. To achieve that result, Congress added the following clause to the end of Section 924(c): "nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony." 115 Cong. Rec. 34,838 (1969). Senator Mansfield, the sponsor of the amendment, noted that the statute as amended would require a sentence "in addition to the sentence for the crime itself—be it bank

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mittee made that provision applicable only to second and subsequent convictions. See H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968).

[8] As enacted, the new statute provided as follows:

> (c) Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

Pub. L. No. 90-618, § 102, 82 Stat. 1224.

robbery, interstate car theft, or whatever." *Ibid.* Quoting from the Senate Judiciary Committee report that accompanied the legislation, Senator Mansfield also emphasized that a sentence under Section 924(c) "would be imposed as a consecutive sentence to that imposed for the commission of the specific crime." *Ibid.*

The Tenth Circuit believed that Congress may have meant to require something other than a consecutive sentence by using a "roundabout locution" (Pet. App. 12a) in Section 924(c). It found significance in Congress's choice to "negate[] the imposition of a concurrent sentence," rather than "to require consecutive sentences." Pet. App. 12a-13a. The history of that "locution," however, confirms what ordinary English usage makes clear: that Congress viewed a prohibition on a concurrent sentence as the equivalent of affirmatively requiring a consecutive one.

2. As part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139, Congress again revised Section 924(c) in several respects. In particular, Congress substituted the phrase "crime of violence" for the term "felony" in order to include violent misdemeanors within the statute's ambit while excluding nonviolent felonies. See S. Rep. No. 225, 98th Cong., 2d Sess. 313 n.19 (1983).[9] Additionally, Congress

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[9] In 1986, as part of the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 457, Congress further amended Section 924(c)(1), *inter alia*, to add narcotics crimes (such as those committed by respondents) to the list of predicate offenses and to increase punishments for certain aggravated violations of Section 924(c) (such as the use or

deleted the requirement that the firearm be carried "unlawfully," and substituted the requirement that the firearm be used or carried "in relation to" a predicate offense. Congress also made clear that Section 924(c) applies even when the underlying offense provides its own enhancement provision for use of a dangerous weapon in the commission of the offense, and thus repudiated the results reached by this Court in *Busic* v. *United States*, 446 U.S. 398 (1980), and *Simpson* v. *United States*, *supra*. Finally, Congress expanded the focus of the prohibition on a concurrent sentence from the underlying predicate crime to "any other term of imprisonment *including*" the underlying predicate crime.[10]

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carrying of machineguns, rather than more ordinary firearms). See generally H.R. Rep. No. 495, 99th Cong., 2d Sess. 2 (1986). The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460, 102 Stat. 4373, further amended Section 924(c) by increasing the mandatory sentences authorized by the statute.

[10] After the 1984 amendment, Section 924(c) (Supp. II 1984) read as follows:

> (c) Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

The Tenth Circuit believed that the 1984 amendment supported the exclusion of state sentences from the scope of Section 924(c)'s prohibition on concurrent sentences. It relied exclusively on the Senate Committee Report's statement concerning the order in which Section 924(c) sentences should be served. That reliance was error, because the statement on which the court relied does not purport to explain any language in Section 924(c). "Without a text that can, in light of [that] statement[], plausibly be interpreted as *prescribing*" the order on which Section 924(c) sentences are to be served, that statement at most reflects "unenacted * * * beliefs[] and desires" which "are not laws." *Puerto Rico Dep't of Consumer Affairs Dep't* v. *Isla Petroleum*, 485 U.S. 495, 501 (1988). As this Court recently noted, "Members of this Court have expressed different views regarding the role that legislative history should play in statutory interpretation," but the Court has never "given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute." *Shannon* v. *United States*, 114 S. Ct. 2419, 2426 (1994).

Moreover, the portion of the 1984 Senate Committee Report that actually speaks to the meaning of the provision at issue here contradicts, rather that supports, the Tenth Circuit's conclusion. As noted above, the 1984 amendment simply broadened a prohibition that had already been in the statute for 14 years. In

explaining the effect of the expanded prohibition on concurrent sentences the Committee Report stated:

> The Committee has concluded that subsection 924(c) should be completely revised to ensure that all persons who commit Federal crimes of violence * * * receive a mandatory sentence, without the possibility of the sentence being made to run concurrently with that for the underlying offense *or for any other crime* and without the possibility of a probationary sentence or parole.

S. Rep. 225, *supra*, at 313 (emphasis added). The Senate Committee's understanding that the 1984 amendments to Section 924(c) would preclude a sentence concurrent with a defendant's sentence "for any other crime" strongly confirms the unqualified language used in the statute itself, and is more pertinent than the language from the same Report on which the Tenth Circuit relied.

Indeed, the Tenth Circuit's interpretation of the effect of the 1984 amendments overlooks a principal thrust of the 1984 changes—to repudiate in broad terms the results of *Busic* and *Simpson* and to ensure cumulative punishments under Section 924(c) and any other crime that the defendant committed at the same time. S. Rep. No. 225, *supra*, at 312-313. The 1984 amendments made clear that Section 924(c) requires a consecutive sentence even when the defendant has been prosecuted and punished, on the basis of the same events, for another federal crime that itself carries an enhanced punishment for use of the same firearm. It makes little sense to suppose that Congress intended to permit a more lenient result when the underlying offense has merely been the

subject of a state prosecution, since such a prosecution, having been undertaken by a different sovereign, vindicated no federal interest.

C. Neither The Rule Of Lenity Nor The Rule Requiring The Avoidance Of "Absurd" Results Requires The Result Reached By The Court Of Appeals

Respondents contended at the petition stage (Hernandez-Diaz Br. in Opp. 6-9; Gonzales Br. in Opp. 8) that the result reached by the Tenth Circuit is supported by the rule of lenity and by the principle "that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffith* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Neither argument helps respondents.

1. The rule of lenity "applies only when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States* v. *Shabani*, 115 S. Ct. at 386; see also *Reno* v. *Koray*, 115 S. Ct. 2021, 2029 (1995). There is no ambiguity here, and thus no occasion for invoking that canon of construction. Respondents' view that Section 924(c) is ambiguous is based on the claim that "the strongest indication of Congress' intent" (Hernandez-Diaz Br. in Opp. 7-8) is found in the 1984 Senate Committee Report concerning the order in which Section 924(c) sentences should be served. As we have explained, however, Congress did not enact textual requirements in Section 924(c) regarding the sequence in which sentences under that section and other sentences shall be served; it required only that they not run concurrently. Legisla-

tive history regarding the Committee's intent cannot create "ambiguity" in clear statutory language.

2. Nor can the result produced by the plain language of Section 924(c) fairly be labeled "absurd" (Pet. App. 11a) solely because the court of appeals did not believe that Congress could have intended drastically to increase the "custodial price" (*id.* at 15a) of Section 924(c) offenses, or because of respondents' view that their sentences would be "unreasonably harsh and unjust." Hernandez-Diaz Br. in Opp. 8; see also Gonzales Br. in Opp. 8. Even if the court of appeals were correct in its calculations of the total number of years that respondents will be required to serve in prison, that type of "ungarnished policy view" has been previously rejected by this Court has a guide for interpreting Section 924(c), see *Deal* v. *United States*, 113 S. Ct. at 1998 & n.3, and neither respondents nor the Tenth Circuit have offered any sound reason why it should fare any better here. Indeed, it is hardly "difficult to fathom" that Congress "could rationally have decided that the use or carrying of a firearm during or in relation to a crime of violence [or drug trafficking crime] warranted a minimum term of imprisonment in addition to any other term of imprisonment imposed on the defendant." *United States* v. *Thomas*, 77 F.3d at 992.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 95-1605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Petitioner,

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ and MARIO PEREZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Section 924(c) of Title 18 imposes prison terms on individuals who "during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm . . . ." It also provides that "the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried."

The question presented in this case is whether a federal court is required to order that a sentence imposed under Section 924(c) runs consecutively to a state sentence that the defendant already is serving for a state conviction based on the same underlying conduct, where the state sentence includes a firearm enhancement imposed by state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

STATUTES — Page

STATEMENT OF THE CASE

The Government's statement of the case adequately frames the issues.

INTRODUCTION

18 U.S.C. § 924(c) is a federal criminal statute that imposes prison terms on individuals who use or carry firearms during and in relation to certain federal drug trafficking or violent crimes. It provides that those prison terms shall not "run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." Despite the fact that the statute makes no reference at all to *state* terms of imprisonment, and that the Section 924(c) prison terms are predicated on the commission of certain highly dangerous *federal* crimes, the Government's position is that the concurrent sentencing prohibition applies to both federal and state terms of imprisonment. That position cannot be sustained in light of the available evidence of Congress's intent—much of which is not addressed in the Government's brief at all.

The Government's analysis of the text of the statute, which focuses almost exclusively on the term "any," wholly ignores relevant contextual evidence. Specifically, other federal criminal statutes, including one that address concurrent sentencing issues, reveal—not surprisingly—that when Congress intends a federal criminal statute to apply to matters arising under state criminal law, it unambiguously says so by expressly referring to state law, not merely by using language such as "any." Congress's consistent practice in this regard and its failure to use similarly specific language in Section 924(c) demonstrates that the statute was intended to apply only to federal terms of imprisonment.

Moreover, the Government's position that Section 924(c) applies to *state* terms of imprisonment raises fundamental issues of federalism that are nowhere addressed

in the Government's brief. Under the Government's view, the concurrent sentencing prohibition in Section 924(c) broadly applies to *any* state prison term—for felonies as well as misdemeanors, for violent crimes as well as non-violent crimes, and for crimes that arose out of the same transaction as the Section 924(c) offense as well as for crimes that did not. Such a categorical requirement that Section 924(c) sentences be served consecutively to *all* state prison terms necessarily alters the traditional federal-state balance in enforcement of the criminal laws, particularly where the state and federal charges arose out of the same course of conduct. *Cf. United States* v. *Lopez*, 115 S. Ct. 1624, 1631 n.3 (1995) ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a "change in the sensitive relation between federal and state criminal jurisdiction.") (internal quotation omitted). In addition, the prohibition on concurrent sentences preempts state sentencing law in cases where the federal charges are tried first and where state sentencing law would permit the subsequent state sentences to be imposed concurrently, even though there is no "clear statement" in the statute that such preemption was intended by Congress.

Congress, of course, has the authority to displace state criminal law in such a manner, but only if it makes its intent unmistakably clear in relevant statutes. In this case, Section 924(c) contains no such clear statement. Indeed, it makes no reference to state law at all. Since Congress is well aware of the clear statement requirement, the absence of any mention of state terms of imprisonment in the statute demonstrates that Congress intended for the concurrent sentencing prohibition to apply only to federal terms of imprisonment. In sum, the term "any" in the statute simply cannot carry the weight that the Government attributes to it.

SUMMARY OF THE ARGUMENT

I. The flaw in the Government's textual analysis of Section 924(c) is that it examines the term "any" in isolation from relevant contextual evidence, which demonstrates that Congress intended for Section 924(c) to apply only to federal terms of imprisonment. Under the "holistic" approach to statutory construction adopted by this Court, courts should not consider one word or provision in isolation, but should consider the context of the language, as well as other statutory contexts in which the same or similar wording has been used.

The Government's interpretation of Section 924(c) is inconsistent with three aspects of the statutory context, all of which demonstrate that when Congress intends a federal criminal statute to apply to state crimes or punishments, it unmistakably expresses that intent by referring to state law, not merely by using language such as "any." *First*, throughout the text of Section 924, Congress demonstrated that it could make clear its intent to include state law within the provisions of that statute by expressly referring to state law. *Second*, when Congress intends a criminal statute to apply to both federal and state subject matter, it does not merely use the term "any," but instead customarily uses the more precise phrase "*any federal or state*" to modify the relevant terms. *Third*, other sections of the Comprehensive Crime Control Act of 1984, the very legislation that added the critical language to Section 924(c), make unmistakably clear that federal terms of probation and supervised release are to run concurrently with federal *and* state terms of probation and supervised release.

When Section 924(c) is interpreted in light of these other statutes, Congress's failure in that section to use similarly specific language—*i.e.*, language that refers to state law—can only mean that it did not intend to require sentences imposed under that section to run consecutively to state sentences. Under the Government's

reading of Section 924(c), the language in these other statutes that specifically refers to state law is mere surplusage. At a minimum, this contextual evidence establishes that the language of Section 924(c) is ambiguous and should be read with lenity.

II. The Senate Committee Report accompanying the 1984 amendments to Section 924(c) confirms that Congress did not intend for that statute to apply to state terms of imprisonment. The Committee Report, which discusses in detail the purposes of the amendments to the statute, makes no mention of an intent to expand the concurrent sentencing prohibition. Instead, the Committee Report explains that the purpose of the amendments was to correct certain drafting problems and to overrule decisions of this Court that had narrowed the scope of the statute. The legislative history's silence with respect to the Government's alleged significant expansion in the statute is compelling evidence that no such expansion was contemplated or intended.

Moreover, another passage in the legislative history affirmatively indicates that Congress did *not* intend to expand Section 924(c) to state prison terms. The Report states that Congress intended the 924(c) sentence to be served *prior* to all other sentences. That sentence order specification precludes the Government's reading of Section 924(c), since it is impossible for a defendant to *begin* serving a Section 924(c) sentence *prior* to a preexisting state sentence.

III. The absence of any indication in the text of Section 924(c) that Congress intended for the statute to apply to state sentences should be dispositive in this case for the additional reason that Congress failed to satisfy applicable "clear statement" requirements. This Court consistently has held that it will not adopt a construction of a federal statute that preempts state law unless such displacement was the clear and manifest purpose of Congress. Even where a statute does not actually preempt

state law, this Court has imposed a similar clear statement requirement where Congress seeks to expand the role of the federal government vis-a-vis the states in an area of traditional state responsibility, such as enforcement of criminal laws.

The Government's interpretation of Section 924(c) would preempt and interfere with the operation of state sentencing law in certain situations, such as where a defendant is first tried and sentenced under Section 924(c), and subsequently tried and convicted on state charges. Under the Government's reading of Section 924(c)—which provides that the sentence under that section "shall [not] run concurrently with any other terms of imprisonment," including state prison terms, the state court would have to impose the state sentence consecutively to the Section 924(c) sentence, regardless of whether state law allowed or even commanded a different result. There is no indication in the statute—much less a clear statement—that Congress intended to preempt state sentencing law. Accordingly, this Court should not adopt a construction of the statute that would have that effect.

IV. Although respondents believe that the text of Section 924(c), interpreted in light of applicable clear statement requirements, and the legislative history demonstrate that Section 924(c) only applies to federal terms of imprisonment, at the very least the text is ambiguous. In these circumstances, where there is an ambiguity with respect to the ambit of the penalties imposed by a criminal statute, the rule of lenity requires that Section 924(c) be interpreted in respondents' favor.

ARGUMENT

SECTION 924(c) FORBIDS THE IMPOSITION OF A SENTENCE THAT RUNS "CONCURRENTLY WITH ANY OTHER TERM OF IMPRISONMENT," ONLY WHERE THE "OTHER TERM OF IMPRISONMENT" IS IMPOSED UNDER FEDERAL LAW.

A. Congress's Failure To Specify That Section 924(c) Applies To Terms Of Imprisonment Under State Law, Where It Has Expressly Referred To State Law In Other Parts Of The Same Statute And In Other Sections Of Title 18, Demonstrates That Section 924(c) Only Applies To Terms Of Imprisonment Imposed Under Federal Law.

The Government's analysis of the text of Section 924(c) essentially starts and ends with Congress's use of the term "any" in that section. In the view of the Government, Congress's use of that "broad[]" term indicated that Congress "necessarily intended to preclude concurrency" with state sentences as well as federal sentences." U.S. Brief 14-15; see also *id.* at 12 ("By using [the] expansive term [any] . . . Congress manifested its intent to reach . . . state terms of imprisonment.") The flaw in the Government's approach is that it examines the term "any" in isolation from all relevant contextual evidence,[1] which demonstrates

[1] The Government's analysis of the statutory context is limited to other features of Section 924(c)(1). For example, the Government points to the first sentence of Section 924(c)(1), which in describing the predicate crimes that trigger the statute expressly limits the phrase "any crime of violence or drug trafficking crime" to federal crimes. U.S. Brief 15-16. The Government suggests that Congress's express limitation of the term "any" to federal crimes in that sentence indicates "that it did not intend to restrict the provision at issue here in the same manner." *Id.* at 15.

The opposite conclusion, however, is equally (if not more) plausible. Since the first sentence of Section 924(c)(1) expressly provides that the additional firearms sentence is only triggered by certain *federal* crimes, a plausible reading of the concurrent sentencing prohibition is that the phrase "any term of imprisonment" is similarly limited to terms of imprisonment *under federal law*. This construction is an application of the doctrine of *ejusdem generis*, which provides that where general language follows an enumeration of specific items, the general language is construed as applying only to items akin to those enumerated. *See Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980). Since Congress enumerated *federal* crimes as the only predicate acts that trigger the firearms sentence, the more general language of the concurrent sentencing prohibition should be construed as applying only to items "akin" to those enumerated in the first sentence, that is, only to *federal* terms of imprisonment.

that Congress meant for Section 924(c) to apply to federal terms of imprisonment only. Specifically, a comparison of Section 924(c) with other parts of Section 924, other sections of Title 18, and other parts of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2138-2139, that address concurrent sentencing issues reveals that when Congress intends a federal criminal statute to apply to matters arising under state criminal law, it unambiguously says so by expressly referring to state law. Congress's failure to do so in Section 924(c)—when it had precise statutory models that it routinely follows—demonstrates that it did not intend that statute to apply to state terms of imprisonment.

This Court repeatedly has emphasized that when interpreting the language of a statute, courts should not consider one word or provision in isolation, but should consider the context of the language, as well as other statutory contexts in which the same or similar wording has been used. See, *e.g.*, *Bailey* v. *United States*, 116 S. Ct. 501, 505-07 (1995); *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991). As this Court has stated:

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

Smith v. *United States*, 508 U.S. 223, 233-34 (1993) (quoting *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)) (examining other subsections of Section 924 to construe the meaning of the word "use" in subsection 924(c)(1)). See also *Bailey*, 116 S. Ct. at 506 ("We consider not only the bare meaning of the word ["use"], but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context.") (internal quotations omitted). The language and structure of related statutes serve as important indicia of Congress's intent in employing particular words or phrases. See, *e.g.*, *Custis* v. *United States*, 511 U.S. 485, ——, 114 S. Ct. 1732, 1736-37 (1994) (concluding that Congress did not intend to permit collateral attacks on prior convictions under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e), in part because related federal statutes expressly permit repeat offenders to challenge prior convictions).

The Government's interpretation of Section 924(c) is inconsistent with three aspects of the statutory context, all of which demonstrate that when Congress intends a federal criminal statute to apply to state crimes or punishments, it unmistakably expresses that intent by referring to state law, not merely by using language such as "any."[2] First, throughout the text of Section 924, Congress demonstrated that it could and would make clear its intent to include state law within the provisions of that statute. See, *e.g.*, subsection 924(a)(5)(A)(ii)(II) (juvenile shall be sentenced to probation if "the juvenile has not been convicted in *any* court of an offense (including an offense under section 922(x) or a similar State law . . .)")

[2] The cases cited by the Government in which this Court expansively has interpreted the term "any" in federal statutes, U.S. Brief 12, are not to the contrary. None of those cases involved the question whether the term "any" encompassed *state*, in addition to federal, subject matter.

(emphasis added); subsection 924(e)(2)(A) (term "serious drug offense" means an offense under certain federal statutes or certain offenses under State law); subsection 924(g)(3) (imposing penalties for the interstate transfer of firearms with the intent to engage in conduct which constitutes various federal offenses or "violates any State law relating to any controlled substance . . ."). Thus, where Congress intended that a subsection include state offenses, it said so. Congress's failure to do so in Section 924(c) cannot be ignored.

Second, the Government's position that Congress's use of the term "any" in Section 924(c) necessarily indicates that Congress meant that statute to apply to federal and state terms of imprisonment is squarely at odds with Congress's customary use of more precise language to indicate that it intends a federal criminal statute to apply to both federal and state subject matter. Specifically, when Congress intends a criminal statute to apply to both federal and state subject matter, it does not merely use the inclusive term "any," but instead typically uses the more precise phrase *"any federal or state"* to modify the relevant terms.[3] These explicit references to *state* law leave no

[3] *See, e.g.*, 18 U.S.C. § 521(b), (d) (enhancing criminal sentence for offense committed by member of a "criminal street gang," where a member is defined as someone who, *inter alia*, has been convicted of *any Federal or State* felony offense involving violence); 18 U.S.C. § 596 (prohibiting the polling of members of the armed forces who execute ballots under *any Federal or State* law); 18 U.S.C. § 841(*l*) (excluding *any Federal or State* offenses pertaining to antitrust violations from crimes that make an individual an unlawful recipient of explosives); 18 U.S.C. § 921(a)(20) (excluding *any Federal or State* offenses pertaining to antitrust violations from crimes that make an individual an unlawful recipient of firearms and ammunition); 18 U.S.C. § 981(e)(4) (allowing property forfeited for certain crimes to be returned to financial institutions as restitution and set off against amounts recovered by the financial institutions in *any State or Federal* proceeding); 18 U.S.C. § 3077(3) (defining United States property within meaning of anti-terrorism statute to include property outside the United

doubt as to the statutes' application to both federal and state criminal systems. Accordingly, Congress's failure to use the customary "any federal or state" language in Section 924(c) is strong evidence that Congress did *not* intend for Section 924(c) to apply to state terms of imprisonment. Congress clearly knows how to draft statutes that apply to state terms of imprisonment, and declined to do so in Section 924(c).

The third relevant feature of the statutory context is other sections of the Comprehensive Crime Control Act of 1984, the very legislation that added the critical language to Section 924(c) concerning concurrent sentencing. In that *same* Act, Congress adopted two provisions (as part of the overhaul of the federal sentencing scheme) that make unmistakably clear that federal terms of probation and supervised release are to run concurrently with Federal *and* State terms of probation or supervised release. See 18 U.S.C. § 3564(b) ("A term of probation runs concurrently with *any Federal, State, or local* term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation.") (emphasis added); 18 U.S.C. § 3624(e) ("The term of supervised release . . . runs concurrently with *any Federal, State, or local* term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release.") (emphasis added). Congress's failure, in the *same piece of legislation*, to use similarly specific language in amending the concurrent sentencing prohibition of Section 924(c) can only mean that Congress did *not* intend to require that sentences imposed under that section run consecutively to state sentences. See *Custis* v. *United States*, 511 U.S. 485, ——, 114

States owned by *any Federal or State* governmental entity); 18 U.S.C. § 3523(b)(5) (authorizing guardian who enforces civil judgments against persons in federal witness protection program to initiate enforcement actions in *any Federal or State* court).

S. Ct. 1732, 1736 (1994) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citations and internal quotations omitted). Had Congress intended Section 924(c) to apply to state sentences, it would have used the precise language in Sections 3564(b) and 3624(e) in amending Section 924(c). The contrast between Section 924(c) and these two other provisions could not be more striking and demonstrates that Congress did not intend Section 924(c) to have the same sweep as Sections 3564(b) and 3624(e).

Under the Government's interpretation of Section 924(c), the language in the Crime Control Act of 1984 and Title 18 that specifically refers to state law—particularly the use of the phrase "federal or state" to modify and clarify the term "any" in numerous statutes—is mere surplusage, contrary to the well-established canon of statutory construction that courts should be "reluctan[t] to interpret a statutory provision so as to render superfluous" the language in related enactments. *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990); see also *Ratzlaf* v. *United States*, 510 U.S. 135, ——, 114 S. Ct. 655, 659 (1994) ("Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense."). Indeed, that canon of statutory construction should apply with particular force in this case because Congress's consistent and longstanding practice is to use the language that the Government's interpretation of Section 924(c) renders superfluous.

In sum, Congress's failure specifically to express an intention to extend the concurrent sentencing prohibition to sentences imposed by state courts for violations of state law demonstrates that Congress did *not* intend for

Section 924(c) to apply to state terms of imprisonment. In light of the specific references to state law in other sections of the Crime Control Act of 1984 and in related provisions of Title 18, Congress's "silence" with respect to state law in Section 924(c) "speaks volumes." *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994). At a minimum, this contextual evidence establishes that the language of Section 924(c) is ambiguous, and that it is necessary and appropriate to consult additional sources for guidance, such as the legislative history. See *Blum* v. *Stenson*, 465 U.S. 886, 896 (1984) (this Court looks "to the legislative history if the statutory language is unclear.")

B. The Legislative History Of Section 924(c) Confirms That The Statute Only Applies To Terms Of Imprisonment Imposed Under Federal Law.

The Senate Committee Report accompanying the 1984 amendments to Section 924(c) confirms that Congress did not intend that statute to apply to state terms of imprisonment. See S. Rep. No. 98-225, 98th Cong., 2d Sess. 312, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490 (the "Committee Report").[4] This intent is evident both in what the Committee Report says and in what it does not say.

The 1984 amendments are central to the analysis because prior to them, Section 924(c) unequivocally did *not* apply to state terms of imprisonment. The pre-1984 version of Section 924(c) only restricted the sentence under it from being served concurrently with "any term imposed for the underlying felony," which was by statutory definition a federal offense. *Simpson* v. *United States*, 435 U.S. 6, 14 n.9 (1978). Thus, if (as the Government argues) the statute was expanded to *state* prison terms,

[4] This Court repeatedly has recognized that "the authoritative source for legislative intent lies in the Committee Reports on the bill." *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986); *Garcia* v. *United States*, 469 U.S. 70, 76 & n.3 (1984).

that change could only have been accomplished through the 1984 amendments, which expanded the concurrent sentencing prohibition to encompass "any other term of imprisonment including" the underlying predicate crime. U.S. Brief 22.

The Committee Report, however, which discusses in detail the purposes of the amendments to the statute, makes no mention of an intent to expand the concurrent sentencing prohibition to state prison terms. Instead, the Committee Report explains that the purpose of the amendments was to correct certain "drafting problems" and to overrule "interpretations of the section in recent Supreme Court decisions" that had reduced the provision's effectiveness. 1984 U.S.C.C.A.N. 3490. Specifically, the Committee Report notes that the pre-amendment language was "ambiguous" as to how first violations should be treated, *id.*, and that the Supreme Court had negated the use of the section where the statutes defining the underlying federal offenses already provided for their own enhanced punishment if the violations were committed by means of a dangerous weapon, *id.* at 3490-91 (citing *Simpson* v. *United States*, 435 U.S. 6, 10 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980)). The aim of the amendments, according to the Committee Report, was "to overcome the problems with the present [sections]" of the statute. *Id.* at 3491.[5]

[5] The Government argues that Congress's express desire to require consecutive sentences even where the underlying federal crime itself carries an enhanced punishment for use of the same firearm indicates that it would not have intended a more "lenient" result where the "underlying" offense has been the subject of a state prosecution. U.S. Brief 24-25. The flaw in this argument is that it proves too much. Under the Government's expansive interpretation of Section 924(c), the firearm sentence must be consecutive to "any" state term of imprisonment, including one involving a nonviolent offense that has nothing to do with the underlying conduct. Accordingly, even though Congress intended consecutive sentences (and indeed thought them particularly appropriate) for

Significantly, however, the Committee Report does not identify the application of the pre-1984 statute only to federal prison terms as a "problem," or suggest that the 1984 amendments were designed to expand the statute to encompass state prison terms. The legislative history is wholly silent with respect to the purported expansion of the statute to *state* sentences that the Government argues Congress intended to address in the amendments. This silence is compelling evidence that Congress did not intend to change pre-1984 law by expanding the section to cover state prison terms. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) ("[S]ilence [in legislative history] . . . while contemplating an important and controversial change in existing law is unlikely."); see also *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613-14 (1991) (If amendment to National Labor Relations Act had been intended to make "important" change, the Court "would expect to find some expression of that intent in the legislative history.").

Moreover, another passage in the legislative history affirmatively indicates that Congress did *not* intend to expand Section 924(c) to state prison terms. The Report states that "the Committee intends that the mandatory sentence under the revised subsection 924(c) be served *prior to the start* of the sentence for the underlying or any other offense." 1984 U.S.C.C.A.N. 3492 (emphasis added). This language indicates that Congress could not have intended for Section 924(c) to apply to preexisting state sentences, since it is impossible for a defendant to *begin* serving a Section 924(c) sentence *prior* to a state sentence that he is already serving. Thus, Congress did not contemplate that Section 924(c) would apply to the situation presented in this case, *viz.*, where respondents were serving state sentences at the time of their federal

certain "extremely dangerous [federal] offenses," 1984 U.S.C.C.A.N. 3490, that carry their own firearms enhancements, it does not follow that Congress likewise intended consecutive sentences where the defendant is serving a state sentence for forgery or embezzlement.

sentencing. It is simply impossible to reconcile the Government's position in this case with the Senate Committee's express intent regarding sentence order.[6]

C. Since Congress Did Not Make A "Clear Statement" In Section 924(c) That It Intended To Preempt State Sentencing Law, Or To Fundamentally Change The Federal-State Balance In The Enforcement Of Criminal Law, This Court Should Not Adopt A Construction Of The Statute That Would Have Those Effects.

The absence of any indication in the text of Section 924(c) that Congress intended for the statute to apply to state sentences should be dispositive in this case for the additional reason that Congress failed to satisfy applicable "clear statement" requirements. This Court consistently has held that it will not adopt a construction of a federal statute that preempts state law unless such displacement was the "clear and manifest" purpose of Congress. *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum*, 485 U.S. 495, 500 (1988) (citations omitted). Moreover, even where a statute does not actually preempt state law,

[6] The Government suggests that the sentence order specification in Section 924(c)'s legislative history should not be given any weight in this case because the specification also could suggest that Congress did not intend for Section 924(c) to apply to preexisting *federal* sentences. U.S. Brief 17-18. The question of Section 924(c)'s applicability to prior *federal* sentences is not before the Court. Even if it were, the holistic approach requires that each question of statutory interpretation involve analysis of the language of the statute in light of relevant contextual evidence. While legislative history may be probative if the text is ambiguous, it is ultimately the language of the statute that must be construed. In this case, which raises significant federalism concerns, the sentence order specification in the legislative history is highly relevant because the text of the statute is ambiguous and because the specification precludes the Government's reading of the statute. It does not follow, however, that this Court would have to give the legislative history the same weight—or, indeed, any weight at all—in resolving other statutory interpretation questions that do not raise the same fundamental concerns for state prerogatives.

this Court has imposed a similar clear statement requirement where Congress seeks to expand the role of the federal government vis-a-vis the states in an area of traditional state responsibility, such as enforcement of criminal laws. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 349-50 (1971). The clarity in Congress's enactments cited previously, which identify precisely when Congress intends for state law to be affected by a federal criminal statute, demonstrates that Congress understands and follows these fundamental "clear statement" principles. Thus, Congress's decision to include express references to state law in these other statutes is not the product of whim, but is a direct response to the legal standards established by this Court. Congress's compliance with clear statement requirements in these other statutes reinforces the already strong inference that Congress's choice of language not specifically referencing "state law" plainly reveals an intent to restrict Section 924(c) to federal sentences.

In any event, the Government's construction of Section 924(c) has both the effect of preempting state criminal law in certain circumstances and of altering the traditional federal-state balance in enforcement of criminal laws. Congress, however, did not clearly express an intent in Section 924(c) to accomplish either of those results. Accordingly, pursuant to the clear statement requirements, this Court should not adopt an interpretation of the statute that has those consequences.

When analyzing whether a federal statute preempts state law in an area of traditional state responsibility, such as the enactment and enforcement of criminal laws,[7]

[7] *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1720 (1993) ("The States possess primary authority for defining and enforcing the criminal law") (citations and internal quotations omitted); *United States* v. *Bass*, 404 U.S. 336, 350 (1971) (narrowly construing federal criminal statute to avoid intruding on "traditional state criminal jurisdiction").

this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 500 (citations and internal quotations omitted); see also *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (plurality); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This "clear statement" requirement safeguards fundamental principles of federalism by ensuring that the federal statute does not "impinge[] upon or pre-empt[] the States' traditional powers" where Congress did not clearly intend that result. *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 345 (1994) (citations omitted). Accordingly, in the absence of a manifestly clear purpose to preempt state law, a federal statute is interpreted so that it does not interfere with the operation of state law, particularly in an area of traditional state responsibility.

The Government's interpretation of Section 924(c) would preempt and interfere with the operation of state sentencing law in some circumstances. Consider, for example, a case where the order of the federal and state proceedings is the reverse of the sequence in this case, *i.e.*, a case where a defendant is tried, convicted and sentenced on federal charges, including 924(c), and subsequently is tried and convicted in state court on state charges, either related or unrelated to the federal charges. Under the Government's reading of Section 924(c)—which provides that the sentence under that section "*shall* [*not*] run concurrently with any other terms of imprisonment," including a state prison term—the state court would have to impose the state sentence consecutively to the Section 924(c) sentence, regardless of whether state law allowed or dictated a different result.[8] For example,

[8] Several states, by statute, expressly give state courts discretion to impose state sentences concurrently with preexisting federal sentences. *See, e.g.*, Ark. Code Ann. § 5-4-403(b); Cal. Penal Code § 669; Fla. Stat. Ann. § 921.16(2); Ill. Ann. Stat. ch. 730 § 5/5-

had the respondents been tried first in federal court, rather than vice versa, the state court would have been bound under the Government's reading of Section 924(c) to impose the state sentences consecutively to the federal sentences, even though the state judge would have had the discretion to impose concurrent sentences under state law. *State* v. *Mayberry*, 643 P.2d 629, 632 (N.M. Ct. App. 1982) (common law rule in New Mexico is that two or more sentences are to be served concurrently, although trial court has discretion to require consecutive sentences).

Under this Court's decisions, such preemption of state sentencing authority should not be permitted in the absence of a clear statement in the statute that such preemption was intended. Section 924(c) contains no such statement. There is no express preemption clause in the statute.[9] Nor, as discussed above, is there any indication in the statute that it applies to state terms of imprisonment. Indeed, the statute is wholly silent with respect to state law. Accordingly, there is no indication in the statute—much less a clear statement—that Congress intended to preempt state sentencing law.

8-4(a) (Smith-Hurd 1996); Kan. Stat. Ann. § 21-4608(h); Maine Rev. Stat. Ann. tit. 17-A, § 1256(7); Mo. Rev. Stat. § 558.026(3); N.Y. Penal Law § 70.25(4) (McKinney 1996); Ohio Rev. Code Ann. § 2929.41(A) (Baldwin 1996); Or. Rev. Stat. § 137.370(5); Va. Code Ann. § 19.2-308.1; Wis. Stat. Ann. § 973.15(3). Many such statutes specify that the sentences shall run concurrently, unless the trial court specifies otherwise. *See, e.g.*, Ark. Code Ann. § 5-4-403(b); Ill. Ann. Stat. ch. 730 § 5/5-8-4(a); Or. Rev. Stat. § 137.370(5).

[9] While the statute expressly provides that it applies "[n]otwithstanding any other provision of law," that clause is not a preemption clause because it does not express Congress's intent to displace *state* law. *Cf., e.g.*, the preemption clauses of ERISA, 29 U.S.C. §1144(a) (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan") and of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1) (prohibiting the States from enforcing any law "relating to rates, routes, or services" of any air carrier) (since repealed).

The absence in Section 924(c) of language addressing state law is particularly striking for preemption purposes in light of the other sections of Title 18 and other provisions in the Comprehensive Crime Control Act of 1984 that expressly reference state law. These other statutes provide precise models for how Congress could, and presumably would, have worded Section 924(c) had it intended for that section to preempt state law. In particular, the provisions of the Comprehensive Crime Control Act of 1984 relating to probation and supervised release provide precise blueprints for how Congress would have worded Section 924(c), if it had intended to displace state law concerning the imposition of concurrent or consecutive sentences.[10] Those provisions, by their terms, expressly require that sentences of probation and supervised release imposed by state courts be served concurrently with the federal sentences—whether the state sentences are imposed before or after the federal sentences. Accordingly, those provisions necessarily displace state court sentencing discretion. Congress's failure to use similar "clear statement" language in Section 924(c) can only mean that it did not intend for that statute to preempt state sentencing law. At a minimum, the Court should not fill the void left by Congress.[11] Accordingly,

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[10] *See* 18 U.S.C. § 3564(b) ("A term of probation runs concurrently with *any Federal, State, or local* term of probation, supervised release, or parole for another offense to which the defendant is subject *or becomes subject* during the term of probation.") (emphasis added); 18 U.S.C. § 3624(e) ("The term of supervised release . . . runs concurrently with *any Federal, State, or local* term of probation or supervised release or parole for another offense to which the person is subject *or becomes subject* during the term of supervised release.") (emphasis added).

[11] Congress should have been particularly aware of the need for precision when drafting the 1984 amendments to Section 924(c), inasmuch as the main purpose of the amendments was to overturn this Court's decisions in *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), which narrowly construed *that very statute* on the ground that it was ambiguous with respect to critical sentencing issues.

the Government's interpretation of Section 924(c) should be rejected.

Even if the Government's interpretation of Section 924(c) does not have the effect of preempting state law, it should be rejected because it violates the independent principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in enforcement of criminal law. *United States* v. *Bass*, 404 U.S. 336, 349 (1971). This principle is rooted in concepts of federalism, which dictate that courts should "not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* The clear statement requirement "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.*

In *Bass*, the clear statement principle was invoked as a basis for narrowly construing a substantive federal criminal statute that "render[ed] traditionally local criminal conduct a matter for federal enforcement." *Id.* at 350. *Bass*'s clear statement principle is applicable in this case because Section 924(c) not only creates a federal crime that overlaps state criminal jurisdiction, but (under the Government's view) also requires that the sentence for that crime be served consecutively to the sentence for *any* state crime. Where the state sentence is based on the same course of conduct as the Section 924(c) conviction —a scenario that the Government admits may arise frequently [12]—the effect of the concurrent sentencing prohibition is to increase the term of incarceration for "traditionally local criminal conduct." Thus, under the Government's interpretation of Section 924(c), that statute is a

[12] As the Government itself points out, "the bulk of conduct covered by Section 924(c) . . . would also be covered by, and *would be frequently prosecuted under*, state criminal statutes." U.S. Brief 14 (emphasis added).

mechanism by which the federal government, if it chooses to bring charges, can supplement state penalties for certain violent conduct, even where the state already imposes enhanced penalties for use of a firearm.[13]

Where the state sentence is *not* based on the same course of conduct as the Section 924(c) conviction, the prohibition on concurrent sentences necessarily affects the federal-state balance by preempting state sentencing law that would permit concurrent sentences and by displacing the federal courts' usual discretion to impose concurrent sentences.[14] By precluding concurrent sentences in cases where state and federal courts would otherwise impose them, Section 924(c) effectively increases the potential punitive consequences of all state convictions, including convictions for non-violent offenses that have no nexus to the penological objectives of Section 924(c).

While Congress has the authority to alter the traditional federal-state balance in criminal enforcement by supplementing state penalties and by prohibiting concurrent sentences, the clear statement standard in *Bass* requires that courts not presume such alteration unless Congress has "convey[ed] its purpose clearly." As discussed above, Congress has not conveyed such a purpose clearly in Section 924(c). In contrast to many other federal criminal statutes, there is no indication in the statute that Congress

[13] Ordinarily, federal courts faced with successive federal and state prosecutions arising out of the same course of criminal conduct apply United States Sentencing Guideline § 5G1.3(b), which provides that federal and state terms of imprisonment based on the same course of conduct *should run concurrently*. *See* Application Note 2 to U.S.S.G. § 5G1.3. Under the Government's construction of Section 924(c), that statute necessarily displaces the Guidelines.

[14] 18 U.S.C. § 3584(a), which also was enacted as part of the Comprehensive Crime Control Act of 1984, provides that "[i]f . . . a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively."

meant to affect state sentencing law. Accordingly, this Court should reject the Government's interpretation of Section 924(c), which encroaches on state prerogatives in enforcement of criminal laws.

D. The Rule Of Lenity Requires That Section 924(c) Be Interpreted Most Favorably To Respondents.

The foregoing discussion of the text of Section 924(c), the legislative history, and the absence of a clear purpose in the statute to preempt state law or alter the federal-state balance demonstrates that Section 924(c) only applies to federal terms of imprisonment. At the very least, however, it demonstrates that Congress's intent is unclear, *i.e.*, that the Government cannot establish that its interpretation of Section 924(c) is unambiguously correct.

In these circumstances, where there is an ambiguity with respect to the ambit of the penalties imposed by a criminal statute, the rule of lenity requires that Section 924(c) be interpreted in respondents' favor. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979); *Simpson* v. *United States*, 435 U.S. 6, 14-15 (1978); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). The policy of lenity:

> means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.

Ladner v. *United States*, 358 U.S. 169, 178 (1958). Thus, "where text, structure, and history fail to establish that the Government's position is unambiguously correct —[the Court applies] the rule of lenity and resolve[s] the ambiguity in [a criminal defendant's] favor." *United States* v. *Granderson*, 114 S. Ct. 1259, 1267 (1994) (citing *United States* v. *Bass*, 404 U.S. 336, 347-49 (1971)).

This case provides the paradigmatic example of a situation where the rule of lenity should be applied. At a minimum, respondents' analysis of the text and legislative history of the statute, as well as clear statement principles, establishes that the Government's position in this case is not unambiguously correct. Accordingly, in order to avoid "more than doubl[ing] the custodial price," 65 F.3d at 821, that respondents will have to pay where Congress did not clearly intend that result, the rule of lenity dictates that Section 924(c) should be interpreted in respondents' favor. Thus, Section 924(c) should not be construed as requiring that respondents' lengthy state terms of imprisonment, which already incorporate state firearm enhancements, be served consecutively to the sentence under that statute.[15]

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[15] Respondents Gonzales, Hernandez-Diaz and Perez are, respectively, currently serving sentences of thirteen years, fourteen and one-half years, and seventeen years in the New Mexico Penitentiary system. These sentences reflect enhancements under Section 31-18-16 N.M.S.A., which provides that the sentence for a non-capital felony is increased by one year if a firearm was used in the commission of the offense.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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September 20, 1996

(8)

No. 95-1605

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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18 pp

TABLE OF AUTHORITIES

Cases—Continued: Page

Statutes and regulations:

Miscellaneous: Page

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REPLY BRIEF FOR THE UNITED STATES

Respondents have largely departed from the reasoning of the court of appeals, the only court that has accepted their view on the question presented by the petition. Instead, respondents now offer three new reasons to support their contention that sentences under Section 924(c) (18 U.S.C.) are required to run consecutively only with *federal* terms of imprisonment, not *state* terms of imprisonment. First, respondents argue that, based on the context and background of Section 924(c), Congress would have specified "federal and state" sentences if it had meant to cover both, rather than mandating that Section 924(c)'s prison terms "shall not * * * run concurrently with *any* other term of imprisonment." Sec-

ond, respondents suggest that a "clear statement" principle, applicable when Congress preempts or intrudes on state law, requires that the phrase "state sentence" appear in Section 924(c) before Congress may be deemed to have required a federal sentence to run consecutively with a state sentence. Third, respondents rely on the rule of lenity. None of those arguments has merit.

1. a. Respondents' principal textual argument (Resp. Br. 6-12) is that Section 924(c) should be read in the "context" of other statutes in which Congress has used the phrase "any federal or state" rather than the single word "any." According to respondents, an express reference to the States is the "customary" and "typical[]" locution (Resp. Br. 9) invoked by Congress when it desires to reach a class that includes state, as well as federal, subjects. This Court's cases, however, have recognized no such rule. See *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1604 (1994) (federal statute that refers to an arrest made by "any law enforcement officer" includes "federal, state, or local" officers); *The Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1870) (statute forbidding filing suit "in any court" makes it "quite clear that it includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense"); Gov't Br. 12-13. Congress is well aware that state courts, like their federal counterparts, impose sentences of imprisonment. *Callanan* v. *United States*, 364 U.S. 587, 594 (1961) (Congress is familiar with "the commonplaces of our law"). The legislature's use of the phrase "any other term of imprisonment" thus naturally refers to both state and federal sentences.

Respondents note (Br. 8-10) that in some other contexts, Congress has explicitly referred to "federal or state" sentences. Those statutory settings, however, required that language to clarify their scope.[1] They shed no light on the meaning of Section 924(c), whose broad reference to "any other term of imprisonment" is plain on its face. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("The plain meaning of [a statutory provision] cannot be altered by the use of a somewhat different term in another part of the statute."). That conclusion gains added force when Section 924(c) is compared with 18 U.S.C. 3584(a), the statute that sets forth the general rule that federal courts have discretion to impose con-

[1] Respondents place particular reliance (Resp. Br. 8-9) on several provisions of 18 U.S.C. 924 in which Congress expressly referred to State law. In each instance cited by respondents, however, Section 924 refers to a subset of state and federal law, making it necessary to specify the precise contours of each component. For example, 18 U.S.C. 924(g) prohibits interstate firearm transfers performed with an intent to engage in conduct that would violate either the federal Controlled Substances Act or "any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))." Similarly, 18 U.S.C. 924(e)(2)(A)(ii) defines the term "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." And 18 U.S.C. 924(a)(5)(A)(ii)(II) precludes federal courts from imposing on a juvenile a sentence of probation if the juvenile has been convicted of "an offense under section 922(x) or a similar State law." In contrast, Section 924(c) broadly prohibits federal courts from imposing a sentence that would run concurrently with "any other term of imprisonment."

current or consecutive sentences. Section 3584(a), like Section 924(c), contains no reference to state sentences; it refers simply to a defendant's "undischarged term of imprisonment."[2] Yet Section 3584(a) has been universally construed to authorize a sentencing court to run a new sentence concurrently or consecutively with any other sentence, whether state or federal. *United States* v. *Adair*, 826 F.2d 1040, 1041 (11th Cir. 1987) (per curiam) ("[W]e find that it is within the district court's power to order that a federal sentence not begin until the completion of a state sentence."); *United States* v. *Gullickson*, 981 F.2d 344, 349 (8th Cir. 1992); *United States* v *D'Iguillont*, 979 F.2d 612, 613, 615 (7th Cir. 1992), cert. denied, 507 U.S. 1040 (1993); see also *United States* v. *Hardesty*, 958 F.2d 910, 912-914 (collecting cases), aff'd en banc, 977 F.2d 1347 (9th Cir. 1992).[3] Because Section 3584(a), like the relevant language in Section

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[2] Section 3584(a) states in pertinent part:

> **(a) Imposition of Concurrent or Consecutive Terms.**— If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant *who is already subject to an undischarged term of imprisonment*, the terms may run concurrently or consecutively.

18 U.S.C. 3584(a) (emphasis added).

[3] The courts of appeals have differed on the extent to which the Sentencing Guidelines limit a sentencing court's discretion under Section 3584(a) to make the consecutive-versus-concurrent determination. See *United States* v. *Vega*, 11 F.3d 309, 314-315 (2d Cir. 1993) (collecting cases); *United States* v. *Flowers*, 995 F.2d 315, 316 (1st Cir. 1993) (Breyer, C.J.) (same). But no court has suggested that sentencing courts lack all discretion under Section 3854 to make a sentence consecutive to a state sentence.

924(c), addresses the issue of consecutive sentencing, its application to state sentences without an explicit mention of them is highly significant.

The history of Section 3584(a) reinforces that point. Section 3584(a) was enacted in the 1984 legislation that also amended Section 924(c).[4] In the Senate Report accompanying the bill, the Judiciary Committee explained that under then-existing law, a federal sentence "imposed on a person already serving a prison term is deemed to be concurrent with the first sentence if the first sentence is for a federal offense, but is usually served after the first sentence if that sentence involves imprisonment for a State or local offense." S. Rep. No. 225, 98th Cong., 2d Sess. 126 (1983) (footnotes omitted). The Committee noted that Section 3584(a) would change current law for "a person sentenced for a Federal offense who is already serving a term of imprisonment for a State offense," by generally departing from the requirement that federal sentences always be made consecutive to state sentences, and instead permitting a sentencing court to impose a consecutive *or* a concurrent sentence. S. Rep. No. 225, *supra*, at 127. Significantly, the Report refers to Section 924(c) as an exception to the rule in Section 3584(a) that "if the court is silent as to whether sentences to terms of imprisonment imposed at the same time are concurrent or consecutive, the terms run concurrently." S. Rep. No. 225, *supra*, at 127 & n. 313. The legislative history thus reveals

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[4] Section 3584 was enacted in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 2000. The amendments to Section 924(c) that made its consecutive-sentencing mandate applicable to prior state sentences were part of the same legislation. Gov't Br. 21-22.

three significant points: first, the background rule (before Section 3584(a)) was that federal sentences ran *consecutively* to state sentences; second, Congress understood that Section 3584(a)'s unadorned reference to an "undischarged term of imprisonment" being served by a prisoner at the time of his federal sentencing includes state as well as federal sentences; and, third, Congress understood that the mandatory consecutive-sentencing feature of Section 924(c) was an exception to the general rule of discretion afforded under Section 3584(a).[5]

Respondents' contention that a statute must employ the word "state" in order to refer to state-law

[5] Because Section 3584(a) is the most relevant comparison for assessing the scope of Section 924(c)'s consecutive-sentencing provision, respondents are not helped by the fact that two other provisions of the Comprehensive Crime Control Act of 1984 expressly refer to state sentences. See 18 U.S.C. 3564(b) (probation sentence runs concurrently with other sentences); 18 U.S.C. 3624(e) (same for supervised release). In any event, the Comprehensive Crime Control Act is hardly a model of consistency in its terminology. At least two other of its provisions do not employ the term "state," yet even the court below would agree that they plainly include prior state sentences. See 18 U.S.C. 3146(b)(2) (providing that the mandatory punishment for bail jumping "shall be consecutive to the sentence of imprisonment for any other offense"); 18 U.S.C. 3147 (providing that the punishment for offenses committed while on bail "shall be consecutive to any other sentence of imprisonment"); *United States* v. *McCary*, 58 F.3d 521, 524 (10th Cir. 1995) (Section 3147 "clear[ly] and unambiguous[ly]" requires a sentence consecutive to any state or federal sentence); *United States* v. *Kalady*, 941 F.2d 1090, 1097 (9th Cir. 1991). Thus, if any lesson emerges from Congress's usage in the 1984 Act, it is that respondents are incorrect in suggesting (Resp. Br. 9) that Congress has a settled practice or custom of referring to the States expressly in federal criminal statutes.

subjects cannot be reconciled with their view (Resp. Br. 21 & nn.13, 14; see also NACDL Br. 15-21) that they should have been sentenced under 18 U.S.C. 3584(a), and the Guideline that implements that statute. See Guidelines § 5G1.3. Section 3584(a) does not expressly refer to state sentences, but, as respondents acknowledge, it applies to state sentences. Respondents are thus left with no sound basis for arguing that Section 924(c) should be construed otherwise. In any event, respondents' claim that they should be sentenced under Section 3584(a) and Guidelines § 5G1.3 cannot be reconciled with the introductory clause of Section 924(c)'s sentencing provision. That clause provides that the requirement of consecutive sentencing in Section 924(c) applies "[n]otwithstanding any other provision of law."

There is no greater merit to Amicus NACDL's argument (NACDL Br. 6-15) that the unqualified phrase "any term of imprisonment" excludes not only state sentences, but also all previously imposed *federal* sentences. In the NACDL's view, Congress's use of the word "imposed" in Section 924(c) suggests that the prohibition on concurrent sentences applies only to other terms of imprisonment "imposed" when the defendant is sentenced for the Section 924(c) offense. The problem with that argument is that Section 924(c) does not say that Section 924(c) sentences may not run concurrently with other sentences imposed at the same time; it instead forbids the sentencing court from running the Section 924(c) sentence concurrently with "any other" sentence "*including*" any sentence imposed for the underlying crimes in which the firearm was used or carried. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of

all-embracing definition, but connotes simply an illustrative application of the general principle"). Amicus' argument would turn Section 924(c)'s broad proscription on its head.

b. Respondents recognize that the legislative history provides no evidence that Congress intended to exclude previously imposed state terms of imprisonment from Section 924(c)'s categorical prohibition of concurrent sentences. They claim, however, that the legislative history's "silence is compelling evidence that Congress did not intend to change pre-1984 law by expanding the section to cover state prison terms." Resp. Br. 14. As this Court has emphasized, however, "[t]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances' * * * when a contrary legislative intent *is clearly expressed*." *Ardestani* v. *INS*, 502 U.S. 129, 135-36 (1991) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981) (emphasis added)). The failure to make specific mention of "state sentences" in the legislative history does not meet that standard. Rather, as this Court has repeatedly emphasized, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988); see also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.").

Respondents place some weight on the "sentence order specification" (Resp. Br. 15 n.6) in the Senate Committee report, *i.e.*, the statement that sentences under Section 924(c) should be served before the start of any other sentences. S. Rep. No. 225, *supra*, at 313.

As we pointed out in our opening brief (Gov't Br. 23-25), that statement does not purport to explain any language in Section 924(c), and thus is entitled to no weight in construing that provision. Respondents fail to address this Court's cases refusing to give effect to legislative history that is "in no way anchored in the text of the statute" (*Shannon* v. *United States*, 114 S. Ct. 2419, 2426 (1994)). Moreover, respondents themselves recognize that the "sentence order specification in Section 924(c)'s legislative history" cannot be taken literally, because it would imply that a Section 924(c) sentence may run concurrently with a *federal* sentence that the defendant might be serving—a suggestion respondents decline to defend. See Resp. Br. 15 n.6 (arguing that the legislative history may have no weight in resolving that question, since it does not implicate "state prerogatives"). The fact that the legislative history gives no consistent guide to the application of Section 924(c) underscores that, as respondents concede (*ibid.*), "it is ultimately the language of the statute that must be construed."[6]

2. Respondents contend (Resp. Br. 15-22) "that Congress failed to satisfy * * * 'clear statement' requirements" that apply when a federal statute either "preempts state law" (*id.* at 15) or alters "the

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[6] Amicus NACDL contends (NADCL Br. 9-15) that the legislative history of the 1984 amendments establishes the wholly "federal focus" of Section 924(c). The passages on which Amicus NADCL relies, however, merely reflect what the text of Section 924(c) makes explicit, *i.e.*, that Section 924(c) is violated by using or carrying a firearm in relation to certain predicate federal crimes. In contrast to the explicit requirement that the *predicate* offense be a federal crime, the text of Section 924(c) imposes no parallel requirement with respect the prohibition on concurrent sentences.

federal-state balance" by "render[ing] traditionally local criminal conduct a matter for federal enforcement." *Id.* at 20, quoting *United States* v. *Bass*, 404 U.S. 336, 350 (1971). There is no basis for invoking a "clear statement" principle here.

Section 924(c) does not affect, much less "preempt," state authority in any way. Section 924(c)'s prohibition on concurrent sentences instead addresses a purely federal question: how federal courts should impose sentences on defendants convicted of committing a federal crime. Section 924(c) answers that question by establishing a mandatory sentence and by further mandating that the sentence must not run concurrently with "any other term of imprisonment." It does not, as respondents suggest (Resp. Br. 17-18), interfere with the ability of state courts to impose a concurrent sentence when a defendant is sentenced in federal court first, before being sentenced for a state crime. The language of Section 924(c) addresses how a federal court should impose sentence on a defendant convicted under that subsection; in contrast to the provisions cited by respondents (see Resp. Br. 18 n.10), Section 924(c) does not speak at all to how state courts that might *later* sentence the defendant for state crimes should exercise their authority.[7] As a

[7] In case there could be any doubt, 18 U.S.C. 927 expressly disclaims any congressional intent to preempt state law. Section 927 provides:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

result, state judges remain entirely free to apply state rules of concurrency when they impose sentences under state law. They simply cannot prevent federal courts that might later sentence the defendant from directing that the new federal sentence must result in additional time in prison above and beyond that already imposed by the state sentence.

Section 924(c) also does not disturb the federal-state balance. "[T]here is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law." *United States* v. *Culbert*, 435 U.S. 371, 379 (1978). But Section 924(c) imposes no restrictions on state criminal justice systems; "the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions." *United States* v. *Turkette*, 452 U.S. 576, 586 n.9 (1981). All Section 924(c) does is to mandate for one particular federal crime a requirement of consecutive sentencing that traditionally was the norm for all crimes in the federal system. See S. Rep. No. 225, *supra*, at 126 (noting that federal sentences were generally made consecutive to prior state sentences); *United States* v. *Hardesty*, 958 F.2d at 912-913. State courts have never had the authority to provide that later-sentencing federal courts may not impose incremental punishment on conduct that already has been punished in state court. See, *e.g.*, *Pinaud* v. *James*, 851 F.2d 27, 30 (2d Cir. 1988) ("[E]ven if the state sentence has been imposed with the expectation that it will be served concurrently with a yet-to-be imposed federal sentence, the federal court need not make its sentence concurrent with the state sentence but remains free to make the federal sentence consecutive."); accord *United States* v.

Smith, 972 F.2d 243, 244 (8th Cir. 1992); *Thomas* v. *Whalen*, 962 F.2d 358, 362 (4th Cir. 1992), cert. denied, 507 U.S. 936 (1993); *Meagher* v. *Clark*, 943 F.2d 1277, 1282 (11th Cir. 1991). Construing Section 924(c) to require that sentences be consecutive to other state as well as federal sentences thus breaks no new ground.[8]

In any event, even if "clear statement" principles did apply, the language of Section 924(c) meets the standard of clarity. As we have demonstrated (Gov't

[8] There is no merit to amicus NACDL's novel argument (NACDL Br. 21-25) that the "dual sovereignty" doctrine precludes a federal court from imposing a consecutive sentence when state law would require a concurrent sentence. Far from being dictated by the "dual sovereignty" doctrine, amicus' argument is refuted by that doctrine. The essence of the "dual sovereignty" doctrine is that each sovereign may criminalize and punish the same conduct as it sees fit, see, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 89 (1986); *Abbate* v. *United States*, 359 U.S. 187, 195 (1959); *United States* v. *Lanza*, 260 U.S. 377, 382 (1922); *Southern R.R.* v. *Railroad Comm'n*, 236 U.S. 439, 445 (1915); *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 20 (1852), not the opposite principle that a State's assessment of the gravity of criminal conduct binds the federal government in the enforcement of its own laws.

With respect to amicus' suggestion that the prosecution of respondents violated internal Department of Justice (DOJ) policies (NACDL Br. 27-29), it suffices to say that respondents themselves have abandoned any such claim (see, *e.g.*, *Reno* v. *Koray*, 115 S. Ct. 2021, 2024 n.2 (1995)), that the policy, even when it applies, requires nothing more than internal authorization of the successive federal prosecution (see United States Attorneys' Manual § 9-2.142), which was obtained in this case, and that internal DOJ policies confer no enforceable rights on criminal defendants (see, *e.g.*, United States Attorneys' Manual § 1-1.100; *United States* v. *Carson*, 969 F.2d 1480, 1495 n.8 (3d Cir. 1992); *United States* v. *Senibaldi*, 959 F.2d 1131, 1136 (1st Cir. 1992)).

Br. 11-19), that language can only be read as forbidding a Section 924(c) sentence that will run concurrently with *any* previously imposed "term of imprisonment." No argument advanced by respondents establishes otherwise.

3. Finally, respondents contend (Br. 22-23) that their alternative interpretation of the statutory language is at least sufficient to show that our "position is not unambiguously correct," and thus to invoke the rule of lenity. That is incorrect. This Court has emphasized repeatedly that the rule of lenity only applies when there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974); see also *Reno* v. *Koray*, 115 S. Ct. 2021, 2029 (1995), and does not come into play "merely because it [is] *possible* to articulate a more narrow construction than that urged by the Government," *Moskal* v. *United States*, 498 U.S. at 108 (emphasis in original). As we have explained, and as every court of appeals to consider the question save for the court below has concluded, the text of Section 924(c)'s sentencing provision unambiguously directs that the sentence must be made consecutive to any other sentence that the defendant might be serving.

* * * * *

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

No. 95-1605

(10)

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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46 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization whose members represent persons accused of crime. Among the missions of NACDL is to ensure justice and due process for persons accused of crime. NACDL has over nine thousand members nationwide, and is affiliated with sixty-eight state and local criminal defense organizations with over twenty-eight thousand members. The NACDL is the only national bar association devoted exclusively to the concerns of criminal defense lawyers.

The question raised by this case is whether sentences for violation of 18 U.S.C. § 924(c) may run concurrently to any unexpired term of imprisonment imposed by a State for the same criminal conduct, which a defendant may be serving at the time of federal sentencing. The answer to this question will have far-reaching impact upon the administration of criminal justice in each of the fifty states and throughout the federal judicial system. For that reason, NACDL seeks to address the interests of defendants who may not be situated precisely as the respondents in this case, but who are affected by the Court's resolution of this issue.[1] NACDL believes that it can assist the Court in examining important policy questions raised by this case.

STATEMENT OF THE CASE

Respondents Miguel Gonzales, Orlenis Hernandez-Diaz, and Mario Perez were tried, convicted and sentenced in the Second Judicial District of New Mexico for activity related to a reverse sting operation conducted by the Albuquerque Police Department in Albuquerque, New Mexico during April, 1991. The Petitioner argues that this Court should endorse an approach that would improperly regulate New Mexico's

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[1] *Amicus* has obtained consent to the filing of this brief from all interested parties, and letters of consent have been filed with the Clerk of the Court.

authority to fashion the appropriate sentence for these offenders and others who violate its laws.

The Honorable Woody Smith's sentence included actual imprisonment of thirteen (13) years for Mr. Gonzales, fourteen and one half (14 1/2) years for Mr. Hernandez-Diaz, and seventeen (17) years for Mr. Perez. The state court's determination of Mr. Gonzales' sentence is illustrative of that court's care in fashioning the appropriate punishment. Judge Smith sentenced Mr. Gonzales to nineteen and one half (19 1/2) years. This sentence included nine (9) years for Armed Robbery, three (3) years for Attempt to Commit a Felony to wit: Armed Robbery of Marijuana, three (3) years for Conspiracy to Commit Armed Robbery, and one and one half (1 1/2) years for Conspiracy to Commit Possession of Marijuana (eight ounces or more). Additionally, the New Mexico court enhanced the convictions for Armed Robbery, Attempt to Commit a Felony, and Conspiracy to Commit Armed Robbery, each by one (1) year pursuant to N.M. Stat. Ann. § 31-18-16 (1978).[2] Judge Smith, exercising his discretion, ordered all sentences to run consecutively. He suspended six and one-half (6 1/2) years of the sentence and ordered Mr. Gonzales to be placed on five (5) years supervised probation and paroled for two (2) years following his release from custody. Thus, Mr. Gonzales' actual sentence included thirteen (13) years of imprisonment followed by five (5) years supervised probation and two (2) years of parole. *Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Miguel Gonzales,* No. CRCR 91-0770, March 24, 1992.[3]

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[2] N.M. Stat. Ann. § 31-18-16 provides in relevant part:

> When a separate finding of fact . . . shows that a firearm was used in the commission of a non-capital felony, the basic sentence of imprisonment prescribed for the offense . . . shall be increased by one year, and the sentence imposed . . . shall be the first year served and shall not be suspended or deferred.

[3] *See also, First Amended Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Orlenis Hernandez-Diaz,* No. CRCR 91-0772, April 23, 1992; *First Amended Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Mario Perez,* No. CRCR-91-0776, April 23, 1992. Although Mr. Gonzales' sentence reflects the state court's general objectives in punishing all three respondents, a pointed comparison of the three state sentences indicates that Judge Smith endeavored to bring consistency and fairness to the process. Judge Smith used his discretion to insure that each of the three respondents would serve relatively similar terms. However, he satisfied the state's interest for additional convictions arising out of the same conduct by imposing actual terms that varied incrementally according to each offender's conduct. For example, compared to Mr. Gonzales, Mr. Perez was charged and convicted of three additional crimes. Mr. Perez was charged and convicted of an additional count of Armed Robbery, False Imprisonment, and Eluding an Officer. Additionally, Mr. Perez' convictions warranted a total of five (5) years for firearm enhancements pursuant to § 31-18-16 NMSA (1978). For these convictions, Judge Smith imposed a total sentence of thirty-two (32) years and three hundred and sixty-four (364) days. Judge Smith then suspended all but seventeen (17) years. *First Amended Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Mario Perez,* No. CRCR-91-0776, April 23, 1992; *see also First Amended Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Orlenis Hernandez-Diaz,* No. CRCR 91-0772, April 23, 1992.

These State of New Mexico orders of conviction and sentence are attached as the Appendix to this Brief.

While respondents were serving their respective state sentences, they were indicted in the District Court of the United States for the same activity that had been the subject of their state court convictions. JA 31-34. A jury convicted respondents of conspiracy to possess and distribute marijuana in violation of 21 U.S.C § 846, aiding and abetting in violation of 18 U.S.C. § 2, possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (B)(1)(D), and the use or carrying of a firearm during a drug trafficking crime, violating 18 U.S.C. § 924(c)(1). JA 138-39, 145-46, 149-50.

The respondents were sentenced by the Honorable John E. Conway, United States District Judge. JA 106-58. Again, the court's determination of Mr. Gonzales' sentence demonstrates the thoughtful approach to what ought to be the ultimate sentence imposed. The court, indicating its concern for notions

of sovereignty, rejected the prosecutor's request to run the substantial majority of Mr. Gonzales' federal incarceration consecutive to the state sentence. JA 112-14. Instead, Judge Conway ordered Mr. Gonzales' sixty (60) month sentence for Count I, conspiracy to possess and distribute marijuana, and sixty (60) month sentence for Count VI, possession with intent to distribute marijuana, to run "concurrently, one with the other and, pursuant to 5G1.3(b) of the sentencing guidelines, concurrently with the State of New Mexico sentence for which [Mr. Gonzales] is currently confined." JA 140. This sentence reflected a three-level guideline enhancement pursuant to § 3A1.2(b), as the court accepted the government's argument that respondents had reason to believe the undercover agents involved in the sting operation were police officers. JA 113-14. Finally, the court interpreted 18 U.S.C. § 924(c)(1) to require the sixty (60) month sentence for Mr. Gonzales' conviction on Count V run consecutively to both the federal and state sentences and imposed it accordingly. *Id.*

The Tenth Circuit Court of Appeals reversed respondents' convictions regarding Count VI, ruling that there was insufficient evidence that Mr. Gonzales ever had possession or constructive possession of the marijuana that served as the lure for the Albuquerque Police Department's reverse sting. *United States v. Gonzales*, 65 F.3d 814, 818-19 (10th Cir. 1995). Additionally, the Court of Appeals set aside the three-level § 3A1.2 enhancement, ruling that the success of the sting operation proved the government's position incredible. *Id.* at 819. Finally, the Tenth Circuit ruled that in successive state-federal prosecutions for the same conduct, guideline § 5G1.3(b) was applicable and required the § 924(c) sentence to be served concurrently with the previously imposed state sentence. *Id.*

All three respondents are currently incarcerated in the New Mexico penitentiary system serving the sentence imposed by the State of New Mexico. Concurrently, they are discharging the federal interest by serving the sentence imposed by the United States District Court for convictions for the violation of 21 U.S.C § 846 contained in Count I and the violation of 18 U.S.C § 924(c)(1).

SUMMARY OF ARGUMENT

18 U.S.C. § 924(c) does not mandate imposition of a consecutive sentence where the defendant is already subject to an unexpired term of imprisonment imposed by a State based upon the same criminal conduct. The plain meaning of the language employed by Congress, when viewed in its context within the entire scheme of federal criminal law, supports this conclusion. This result is also compelled by the legislative history of the Act and Congressional actions in light of this Court's decisions under the prior version of the Act. Moreover, the constitutional principle of dual sovereignty limits the power of Congress to require consecutive punishments for criminal conduct already punished by a State. Finally, the constitutional commands of fundamental fairness, embodied in the due process clauses, also compel the conclusion that the decision below should be affirmed.

ARGUMENT

I. SENTENCES FOR VIOLATIONS OF § 924(c) MAY NOT BE RUN CONSECUTIVELY TO ANY UNEXPIRED TERM OF IMPRISONMENT IMPOSED BY A STATE COURT BASED UPON THE SAME CONDUCT UNDERLYING THE VIOLATION OF § 924(c).

"On a pure question of statutory construction," this Court has often recognized, "the starting point is the language of the statute." *Schrieber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985). In disputes regarding the application of a statute, this Court first reviews the language of the statute to determine whether the text itself settles the issue. Just as this Court has stated in other cases, "the controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992).[4]

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[4] *See also Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.").

While the "plain language" is the starting point, statutory language cannot be viewed in a vacuum. Therefore, it is a simple rule of plain meaning statutory construction that "a word is known by the company it keeps." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). That is, all words must be considered in context, both within the body of the statute and in conjunction with existing law. This Court recently reaffirmed that it must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'" *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, 506 (1995) (quoting *Brown v. Gardner*, 513 U.S. ___, ___, 115 S.Ct. 552, 555 (1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). Congress enacted the current language of § 924(c) as part of a thorough overhaul of federal criminal law. See The Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473. Therefore, § 924(c) must be judged against this background and within this context.

A. The Plain Language of § 924(c), Which Prohibits the Imposition of a Concurrent Sentence, Applies only to Federal Sentences Imposed at the Same Time.

This simple fact that words do not possess independent denotative value and each word may have several meanings dependent on its context is not in dispute. Indeed, Petitioner concedes that the use of the word "any" is limited by its context. Pet. Brief at 15. For example, the Government acknowledges that the context in which the word "any" appears in the first sentence – "any crime of violence or drug trafficking crime" – is limited by the words that follow it in the same sentence: "for which he may be prosecuted in a court of the United States." *Id.* However, when it reaches the phrases "any other provision of law" and "any other term of imprisonment," in the third sentence of subsection (c) of 18 U.S.C. § 924, Petitioner argues, without addressing the context, that the word "any" has been transformed within the statute to become a word of all-encompassing and universal meaning. Contrary to

Petitioner's universal gloss, the critical phrases at issue here, "any other provision of law" and "any other term of imprisonment," apply only to that law and those terms of imprisonment relevant to the sentence imposed at that time. The context of the sentence, the subsection, and the law as a whole do not support any other reading.

The whole of the sentence in which the phrases "any other provision of law" and "any term of imprisonment" appear is:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 924(c).

The subject of this sentence is not "any other provisions of law" or "any other term of imprisonment," but rather is the federal sentencing court. It is the federal judge of the district court, sitting in judgment of federal convictions presently pending sentencing who is limited in the ability to "place on probation," "suspend the sentence of" or order a "term of imprisonment imposed" on a person convicted of the federal crime under § 924(c). The plain meaning of these words necessarily refers to the actions taken at the time of sentencing on the violation of § 924(c).

In light of this section's focus on the sentence imposed, the text of § 924(c) is best plainly read to mean that the federal court may not order the sentence for the violation of the section to run concurrently with any other possible term of imprisonment *imposed* – not in the past – but at that time. Although Petitioner would have this Court focus on the word "any," in fact it is the twice-used word "imposed" which carries the meaning of the sentence. Therefore, "any other term of imprisonment" refers to any other imposed at the time the § 924(c) sentence is imposed. It further includes those additional terms imposed at that time, even if they are terms "imposed for the crime of violence or drug trafficking crime in

which the firearm was used or carried." By its plain language, § 924(c) simply does not address sentences imposed at other times.[5]

This specific language of § 924(c) regarding sentences imposed at one time was necessary because 18 U.S.C. § 3584 (a) provides that multiple terms of imprisonment *imposed at the same time* run concurrently unless the court or the statute mandates that the terms run consecutively. Therefore, the current language of § 924(c) must be read as a plain expression that sentences imposed at the same time, regardless of the conduct underlying the offenses, must not be run concurrently with the sentence imposed under § 924(c).

18 U.S.C. § 924(c) is only one small part of the general penalty section relating to federal firearms violations. Section 924(c), therefore, cannot be read as engrafting upon federal law a rule relating to sentences for violations of law, state or federal, imposed at a time prior to imposition of the sentence under § 924(c). That is, § 924(c) is not a statement of general application to federal sentencing, and should not be read as usurping either 18 U.S.C. § 3584(a) or the Federal Sentencing Guidelines. Instead, it should be read as narrowly as possible: § 924(c) applies only to sentences imposed at the same time as the sentence for violation of that section.

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[5] Petitioner argues that the Tenth Circuit's reading would narrow the application of the statute only to "sentences imposed for the predicate offenses." Pet. Brief at 9. This is incorrect. There is nothing unusual about sentences imposed at the same time for various crimes of violence, drug trafficking crimes, violations of § 924(c), and violations of other federal criminal conduct. *See Deal v. United States*, ___ U.S. ___, 113 S. Ct. 1993 (1993) (§ 924(c) sentence may not run concurrently to any other federal sentences imposed at the same time). Therefore, the narrow reading required by the statute does not eviscerate the efficacy of § 924(c) punishment provisions.

B. The Statutory and Legislative History Demonstrate that § 924(c) Applies Only to Other Sentences Imposed at the Same Time.

The function of the courts in interpreting a statute is to give effect to the intent of Congress. *United States v. American Trucking Assn.*, 310 U.S. 534, 542 (1940). Where the plain language of a statute does not conclusively resolve all interpretation disputes, this Court has routinely turned to statutory and legislative history as the principal sources for determining the intent of Congress. *See, e.g., Bıum v. Stenson*, 465 U.S. 886, 896 (1984) ("where, as here, resolution of a question of federal law turns on a statute and intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear"). The history of a statute allows this Court to accurately interpret the language of Congress in light of its evident legislative purpose. *See, e.g., United States v. Bornstein*, 423 U.S. 303 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Even in instances where the plain language appears to resolve the question of its interpretation, the statutory and legislative history of any law may be used to confirm the presumption that Congress expressed its intent through the language it chose. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Congress enacted the original version of 18 U.S.C. § 924(c) as part of the Gun Control Act of 1968 to deter violent crime by imposing mandatory minimum sentences on people who use a firearm during a federal crime of violence. Pub.L.No. 90-615, 82 Stat. 1214; Pub.L.No. 90-618, 82 Stat. 1227-1235 (codified as ãmended at 18 U.S.C. §§ 921-928 and scattered sections of 26 U.S.C.)[6] (1988 & Supp. IV 1992). The first version of § 924(c) was not included in the original gun control bill. Instead, it was offered as an amendment on the House floor by Representative Poff, and passed the same day it

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[6] 26 U.S.C. § 5801-5802; § 5811-5812; § 5821-5822; § 5841-49; § 5851-5854; § 5861; § 5871-72.

was introduced. 114 Cong. Rec. 22,231, 22,248 (1968). Consequently, legislative history is scarce. *See Simpson v. United States*, 435 U.S. 6, 13 (1978) (recognizing the scarcity of legislative history regarding § 924(c)).

Notwithstanding the limited legislative slate upon which § 924(c) was written, the few comments directed at § 924(c) are compatible only with the federal-specific construction that adheres to the plain meaning of its words. On the House floor Senator Mansfield commented: "[T]he bill provides for the first time a separate and additional penalty for the mere act of choosing to use or carry a gun in committing a crime under a federal law. . . . " 115 Cong. Rec. 34,838 (1968).

The efficacy of § 924(c) as a universal additional penalty for persons using firearms during the commission of federal crimes was somewhat curtailed by a series of cases in which this Court generally interpreted § 924(c) as a cumulative enhancement provision rather than a separate, additional offense. *See Simpson v. United States*, 435 U.S. 6 (1978) (federal judiciary could not apply § 924(c) to supply an additional enhancement absent clear Congressional directive); *Busic v. United States*, 446 U.S. 398 (1980) (federal sentence may not be increased under § 924(c) if defendant's sentence had already been enhanced under the underlying felony statute on account of a firearm). Therefore, under this Court's interpretation, the penalty provisions of § 924(c) were deemed to merge into any firearms enhancement provision attached to the predicate federal offense. Solely in response to this Court's holdings in *Simpson* and *Busic*, Congress acted to insure that § 924(c) applied even where an underlying federal offense included a firearm enhancement provision. The vehicle for this clarification was the Comprehensive Crime Control Act of 1984. *See* Pet. Brief at 22 (conceding the 1984 amendments to § 924(c) were intended to overturn the holdings in *Busic* and *Simpson*).

In addition to hundreds of federal crime changes, including the creation of the United States Sentencing Commission, the Comprehensive Crime Control Act of 1984 made several important changes to § 924(c). Perhaps most importantly, the section was amended to make the text plain that § 924(c) was

to be treated as a separate punishable offense regardless of the enhancement provisions of the underlying federal predicate offense. Comprehensive Crime Control Act of 1984. Continuing Appropriations, 1985 – Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, ch. 10 sec. 1005(a), § 924(c), 98 Stat. 1837, 2139-39 (1984). Therefore, the language of the amendment included new text that punishment for § 924(c) was to be "in addition to the punishment for (the predicate offense)" and that "a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon" may serve as a predicate for § 924(c). 18 U.S.C. § 924(c) (1988 & Supp. IV 1992). Consistent with the sentencing reforms of the Comprehensive Crime Control Act, the amended § 924(c) also eliminated the discretionary power of the federal sentencing judge and fixed punishment at five years for the first offense and ten years for the second. *Id.*

The next amendment to § 924(c) came with Part D of Chapter 10 of the Comprehensive Crime Control Act. Part D demonstrates that Congress only anticipated the application of a consecutive sentence for the commission of crimes under federal law. First, not to be ignored is the title to that chapter: "Mandatory Penalty for Use of a Firearm During a *Federal* Crime of Violence." Ch. 10, pt. D, 98 Stat. at 2138 (emphasis added). The significance of this title is emphasized by the Senate Judiciary Committee Report to Part D of Chapter 10. That Report makes manifest Congress' focus on the narrow issues addressed in *Busic* and *Simpson*, namely that § 924(c) should apply to all qualifying federal offenses, even if they include separate gun possession enhancements:

> Part D of Title X is designed to impose a mandatory penalty without the possibility of probation or parole, for any person who uses or carries a firearm during and in relation to a *Federal crime of violence*. Although present Federal law, section 924(c) of Title 18, appears to set out a mandatory minimum sentencing scheme for the use or unlawful carrying of a firearm *during any Federal felony*, drafting problems and interpretations of the section in recent Supreme

> Court decisions have greatly reduced its effectiveness as a deterrent to violent crime.

S.Rep. No. 98-225, 98th Cong., 2d Sess. 312, reprinted in 1984 U.S.C.C.A.N. 3182, 3490 (emphasis added).[7] Viewed within the entire context of the Act, it is obvious that the focus of the changes enacted by Congress was simply to add the underlying federal offense – even if already enhanced – to those federal offenses for which additional punishment was required. The significance of the wholly federal focus of the Senate Report is revealed in the inclusion of identical language in the final bill. The 1984 changes were not intended in any way to impact the careful balance between State and Federal sovereignty. Nor was the intent to affect sentences for criminal acts for which the individual defendant had already received punishment. Indeed, neither subject was ever raised or addressed.

Section 924(c) was again amended in 1986 by the Firearms Owners' Protection Act. Pub.L.No. 99-308, section 104(a)(2)(A)-(E), 100 Stat. 449, 456 (1986). The most significant change to § 924(c) was to extend its reach to certain drug offenses. This was accomplished by adding the phrase "or drug trafficking crime" after "any crime of violence." *Id.* § 104(c), 100 Stat. 454. The 1986 amendment also added § 924(c)(2) which defined "drug trafficking crime" as "any felony violation of Federal law involving the distribution, manufacture, or

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[7] The Senate Report also contains a broad policy statement reflecting the intent of Congress that the 1984 amendments were to ensure that Section 924(c)'s enhancement provisions apply to federal crimes.

> The Committee has concluded that subsection 924(c) should be completely revisited to ensure that all persons who commit Federal crimes of violence, including those crimes set forth in statutes which already provide for enhanced sentences for their commission with a dangerous weapon, receive a mandatory sentence, without the possibility of the sentence being made to run concurrently with that *for the underlying offense or for any other crime* and without the possibility of a probationary sentence or parole.

S. Rep. No. 98-225 at 313, 1984 U.S.C.C.A.N. at 3491 (emphasis added) (footnote omitted).

importation of any controlled substances (as defined in section 102 of the Controlled Substance Act (21 U.S.C. section 802))." *Id.* § 104(a), 100 Stat. 457. Since 1986, Congress has twice increased § 924(c)'s penalty provisions. The Anti-Drug Abuse Act of 1988, Pub.L.No. 100-690, § 646, 102 Stat. 4181, 4373-74; Crime Control Act of 1990, Pub.L.No. 101-647, § 1101, 104 Stat. 4789, 4829.

The statutory and legislative history fully confirms the plain meaning of § 924(c). Each of these changes was made solely in response to federal concerns regarding the use of firearms in connection with certain crimes. None was intended to change other features of federal sentencing law. Although Congress has progressively extended the reach and punishment of § 924(c) over the 28 years of its existence, there is no evidence to suggest that it mandated the dismantling of federal sentencing law or the principles of dual sovereignty.

The Tenth Circuit correctly recognized that Congress intended sentences under 18 U.S.C. § 924(c) to run *prior* to the service of any other sentence *imposed by the sentencing court.* The legislative history cited by the lower court demonstrates that the language "shall [not] run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried," was meant to apply to all terms of imprisonment handed down by the court imposing the sentence for the violation of § 924(c) – not to any other previously imposed terms of imprisonment. Not surprisingly, § 924(c) is similar to New Mexico's enhancement provisions for the use of a firearm for which the defendants in this case were already punished. N.M. Stat. Ann., § 31-18-16 (1978) provides that the penalty for use of a firearm is an additional one year sentence which "shall be the first year served and shall not be suspended or deferred."

Congress also intended that sentences for using or carrying a firearm in connection with a drug trafficking crime or crime of violence be served *prior* to the service of any other sentence imposed at the same time. The language of the Senate Report quoted by the lower court in its opinion is clear and unambiguous: "In addition, the Committee intends that the

mandatory sentence under the revised subsection 924(c) be served *prior* to the start of the sentence for the underlying or any other offense." *United States v. Gonzales*, 65 F.3d 814, 820 (10th Cir. 1995). The construction placed on § 924(c) by the Petitioner would result in the interests of both sovereigns being frustrated as it is not possible for both the sentences for the use of the firearm to be served "first" without being served concurrently.

Petitioner's legislative intent argument relies on the fiction of Congressional intent by omission. There is no evidence to support Petitioner's theory that Congress meant to extend § 924(c)'s enhancement provision to previously imposed sentences. Instead, the Government's legislative intent argument, inextricably intertwined with its plain meaning analysis, is constructed on the fiction that Congress' complete failure to mention States or State law in § 924(c) evidences a deliberate act. *See* Pet. Brief at 14, ("Congress could not have failed to understand that" § 924(c) would intertwine wholly with State prosecutions); *id.* at 15 ("Congress necessarily intended to preclude concurrence with any sentence imposed by the State authorities for related conduct."); *id.* at 16 (It was "Congress's intent to displace the legal authority that would authorize [a cross-sovereign concurrent] sentence").

Petitioner would have this Court accept and apply the novel proposition that, because Congress may be aware that States exist, by saying nothing, it explicitly meant to include State punishments among those covered under § 924(c). Put another way, the Petitioner's argument assumes that in 1984 Congress silently included States in the § 924(c) sentencing limitations because it knew that this Court, in 1996, would fully understand their unuttered intent and would therefore fill the gaps.

Petitioner's suggestion is twice removed from the reality of the text of § 924(c). When this Court is called upon to examine legislative history, it must employ secondary evidence which may not be accurate. *See, e.g., West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) (Best evidence of legislative purpose is the text adopted by both Houses and

signed into law by the President). Not content with this problem alone, Petitioner would further have this Court find a legislative intent where there is silence by applying a presumption that Congress actually intended all the possible consequences of its actions. This request is based on three faulty assumptions: (1) Congress' understanding of the whole of law at a given point in time is accurate; (2) that body of law was primarily and consciously relevant to the legislative debate; and (3) Congress' actual understanding of the law is immutable and not subject to Court interpretation. This presumed intent by silence argument would, ultimately, strip this Court of its traditional and constitutional powers and would cede interpretive authority of legislative acts to the Executive.

II. THE UNITED STATES SENTENCING GUIDELINES RECONCILE § 924(c) WITH CONCEPTS OF DUAL SOVEREIGNTY WHILE INSURING THE UNIFORMITY AND FLEXIBILITY IN SENTENCING MANDATED BY CONGRESS.

At the direction of Congress, the Federal Sentencing Commission determined that sentences resulting from successive prosecutions by different sovereigns should run concurrently if they emanate from the same criminal activity. The same Act of Congress that mandated the creation of the Commission also included amendments to § 924(c) and the concurrent sentencing power of § 3485. *See* The Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, 28 U.S.C. § 991 *et seq.* Thus, the provisions addressing cross-sovereign concurrent sentencing are part of an intricate design that addresses several, sometimes competing, interests. These provisions were designed to lead to "carefully considered determinations as to the appropriateness of concurrent, consecutive, or overlapping sentences in cases of multiple offenses." S.Rep. No. 225, 98th Cong., 2d Sess. 165 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3348. The Commission furnished the linchpin. The guidelines insure that the federal interest in a sentence is satisfied by sculpting sentences that appropriately reflect the seriousness of criminal activity. The Commission

also built in safeguards, protecting defendants from the danger that separate prosecutions for the same conduct would unfairly increase punishment. Finally, even in the multifarious arena of concurrent/consecutive sentencing, the guidelines induce uniformity while maintaining the flexibility necessary to individualize sentences. In cases of successive prosecutions by state and then federal authorities for the same criminal activity, concurrent sentences eliminate potential disparity; the departure provisions sustain flexibility.

A. The Guidelines Satisfy the Congressional Mandate to Address the Consecutive or Concurrent Sentence Dilemma in a Manner Consistent with the Overall Pattern of Criminal Sentencing Articulated in Title 18.

A scheme directing federal courts to order concurrent sentences in situations of successive state and federal prosecutions for the same activity reinforces Congressional policy to impose a sentence that reflects the seriousness of the offense in a manner respecting the goals of uniformity and individualized sentencing. Congress specifically directed the United States Sentencing Commission to address whether a sentencing court should order multiple sentences to run concurrently or consecutively. 28 U.S.C. § 994(a)(1)(D). Congress also required the guidelines to be consistent with the pertinent provisions of Title 18. 28 U.S.C. § 994(b)(1). The guidelines accomplish this task.

The guidelines anticipate and address the myriad of situations that confront sentencing courts within a framework that was intended to emphasize uniformity and just punishment and to respect the expertise of district courts, as well as the principle of dual sovereignty.[8] Generally, courts sentencing on multiple counts of conviction have discretion to impose concurrent

[8] Congress did not intend for the guidelines to operate in isolation. The Commission sought compatibility with existing law, both state and federal, concerning criminal sentencing. For example, Congress considered a guidelines design superior to mandatory sentencing provisions for attaining "consistent and rational" sentencing policy. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20, n.64 (1991) (*citing* S. Rep. No. 225, 98th Cong., 2d Sess. 39, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3358). Nevertheless, Congress attempted to harmonize mandatory sentencing provisions with a guidelines structure. *See, e.g.*, U.S.S.G. §§ 2K2.4(a) & 5G1.1.

or consecutive terms. 18 U.S.C. § 3584.[9] The guideline provisions complement this discretion. *See, e.g., United States v. Wills*, 881 F.2d 823, 825-27 (9th Cir. 1989) (discussing complementary nature of § 3584 and the guidelines in light of legislative history). The guidelines "say when, and to what extent, terms should be concurrent or consecutive." *United States v. Flowers*, 995 F.2d 315, 317 (1st Cir. 1993). If a

[9] § 3584. Multiple sentences of imprisonment

(a) Imposition of concurrent or consecutive terms. – If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms. – The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate. – Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

particular guideline provision does not specifically contemplate discretion, courts retain the authority to depart. 18 U.S.C. § 3553(b); U.S.S.G., Ch. 1, Pt. A, intro. at 4(b), and § 5K2.0. Thus, the guidelines limit, but do not supersede, the sentencing court's discretion. The federal courts of appeal have adopted this approach. *See United States v. Flowers*, 995 F.2d 315, 316-17 (1st Cir. 1993); *United States v. Rogers*, 897 F.2d 134, 136-37 (4th Cir. 1990); *United States v. Miller*, 903 F.2d 341, 349 (5th Cir. 1990); *United States v. Stewart*, 917 F.2d 970, 972-73 (6th Cir. 1990); *United States v. Shewmaker*, 936 F.2d 1124, 1127-28 (10th Cir. 1991); *United States v. Fosset*, 881 F.2d 976, 980 (11th Cir. 1989); *but see, United States v. Nottingham*, 898 F.2d 390, 393-95 (3d Cir. 1990). An intricate web of directives, coupled with the ability to depart,[10] insures that a sentencing judge will address Congress' intent to impose a just sentence and promote respect for the law, including concepts of dual sovereignty. *See* 18 U.S.C. § 3553(a)(2)(A).

B. Section 5G1.3(b) Reflects the Commission's Intent to Respect Notions of Dual Sovereignty Inherent in Cross-Sovereign Convictions.

Concurrent sentences in successive state and federal prosecutions for the same conduct preserve the integrity of the courts of both sovereigns and safeguard defendants from unfair sentences. In this case, concurrent sentences best address the interests of both New Mexico and the United States. The New Mexico courts fashioned an appropriate sentence to punish respondents for their criminal activity. The federal courts did the same. Only by running the state and federal sentences concurrently is the integrity of both sovereigns maintained.

Likewise, concurrent sentences protect defendants from inappropriately severe periods of incarceration. Section 5G1.3(b) acts as a safeguard, "protect[ing] . . . against having the length of [defendants'] sentence multiplied by duplicative

[10] Courts maintain general authority to depart. 18 U.S.C. § 3553(b). The guidelines anticipate that courts may use their departure power in § 924(c) cases. *See* U.S.S.G. § 2K2.4 (Commentary).

consideration of the same criminal conduct. . . ." *United States v. Witte*, ___ U.S. ___, 115 S. Ct. 2199, 2209 (1995). This safeguard is critical today, when public fear of drugs and violence pushes many courts to the brink of overreaction. And, it is essential to a design that strives towards uniformity in sentencing.[11]

C. Mandating Consecutive Sentences in Cases Involving Successive State and Federal Convictions Would Result in Unwarranted Disparity.

In the great majority of situations, as in this case, concurrent sentences better further the goals of just punishment and uniformity. Congress demanded, received, and passed sentencing guidelines that imposed punishment based primarily on the offense committed and the criminal history of the offender.[12] This vision is contrary to the position urged by the Solicitor General, namely, that this single sequence of events should result in punishment that accumulates both the state and federal sentences.[13] Punishment depends not on the defendants' culpability or criminal history, but rather on the prosecutor's decision to charge the defendants in a federal forum. This posture offends the spirit of the guidelines as well as the wisdom of this Court regarding just sentences. *See United*

[11] The departure provisions secure the federal interest. A district court could always depart upward despite 5G1.3(b). Appellate review of the departure safeguards the defendant in this circumstance. Additionally, because departures must be justified, they are the "discretion of choice." The guidelines structure envisions a common law evolving from district courts' explanations of their departures. U.S.S.G. Ch. 1, Pt. A, at 6.

[12] Even in situations involving ancillary jurisdiction over one or more multiple offenses committed during the same course of conduct, Congress directed the Commission to adopt a scheme of incremental rather than cumulative punishment. 28 U.S.C. § 994(l)(1)(A).

[13] This position ignores the reality that concurrent sentences fully satisfy the federal interest because the absolute punishment reflects the totality of respondents' criminal conduct that was the subject of their federal convictions.

States v. Witte, ___ U.S. ___, 115 S.Ct. 2199, 2208-09 (1995) ("§ 5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence. . . . ")[14] Uniformity, too, will be compromised by the government's position.

Concurrent sentences in cases of successive state-federal prosecutions for a single sequence of events can better assure uniform sentences among offenders from differing jurisdictions without compromising the sovereignty of the states. Uniformity in sentencing is a fundamental goal of our criminal justice

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[14] Although arguably appropriate in situations involving only federal jurisdiction, the use of section 924(c) as a bargaining instrument is not appropriate in cases where dual sovereignty is implicated. Generally, the structure of mandatory minimum sentences endows prosecutors with substantial discretion. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 32 (1991). This discretion "shift[s] . . . control over the implementation of sentencing policies from courts to prosecutors." *Id.; see also Gary T. Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L.REV. 61, 94-5 (1993) (describing how prosecutors use § 924(c) as a "powerful bargaining chip to convince defendants to plead guilty"). Initial empirical data suggests that mandatory minimums like § 924(c) breed unwarranted disparity in sentencing, including disparity based on race and other unlawful factors. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 89 (1991). Anecdotal data suggests that mandatory sentences may actually discourage plea bargains in some situations. *Id.* at 101. While many of the effects of mandatory minimums may further goals of sentencing, this Court must continue to monitor the discretion that charged-based mandatory sentences confer on federal prosecutors. Cases that implicate dual sovereignty are particularly vulnerable to impermissible use of this discretion. The Solicitor General would have this Court endorse a sentencing scheme that would allow federal prosecutors excessive and undue leverage during plea negotiations regarding state charges. If § 924(c) sentences were imposed consecutive to those assessed by state courts, federal prosecutors could multiply defendants' liability. The result, in addition to unwarranted disparity and inappropriately harsh sentences, would be an impermissible imposition on a state's sovereign power to fashion an appropriate criminal sentence.

system. The sentencing guidelines represent the most concerted effort towards consistency in punishment. Fundamental to the notion of sovereignty is the right of a state to fashion criminal punishment. State sentences for similar criminal activity will vary. A federal sentence imposed consecutively will increase, not eliminate, disparity.

III. PRINCIPLES OF DUAL SOVEREIGNTY AND DUE PROCESS REQUIRE THAT SENTENCES FOR VIOLATIONS OF § 924(c) MAY NOT RUN CONSECUTIVELY TO A TERM OF IMPRISONMENT IMPOSED BY A STATE COURT BASED UPON THE SAME CONDUCT UNDERLYING THE VIOLATION OF § 924(c).

Each of the several States shares with the federal government a concurrent sovereignty. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The power of each sovereign, however, is not entirely discrete and separate. Indeed, it is the very *concurrency* of power which acts in this Constitutional Union as the mechanism which insures a check on governmental abuses of either sovereign. *Id.* at 458.[15]

In this sympathetic system of dual sovereignty, the federal government is given a constitutional advantage in this balance *vis-à-vis* the Supremacy Clause. U.S. Const., Art. VI cl. 2. However, this clause does not destroy the independent sovereignty of the States. Further, it "is a power [the Court] must assume Congress does not exercise lightly." *Gregory*, 501 U.S.

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[15] See also The Federalist Papers, No. XXVIII:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.

Petitioner in this case is one of these rival powers and Respondent and *Amicus* are cast in the role of advocating the States' interest in checking that power.

at 460. The delicate balance occasioned by the constitutional mechanism of dual sovereignty depends on this Court presuming no favor to the federal government. This restraint is particularly necessary in circumstances in which the sovereign power, although concurrent, resides primarily with the States.

A. This Court Must Maintain the Delicate Balance of Power Between the State and Federal Sovereigns Regarding Criminal Justice.

Petitioner concedes in its brief that "the punishment of crimes is primarily the province of the States." Pet. Brief at 8, *see also id.* at 14 (*quoting Brecht v. Abrahmson*, 507 U.S. 619, 635 (1993)) ("States possess primary authority for defining and enforcing criminal law.") In our concurrent system of sovereignty, the States' primacy of interest in criminal justice helps insure that citizens feel close allegiance to the State. Such allegiance is created by just implementation of the laws, both public and private, to the disputes of each State's citizens. Such allegiance assures States remain viable and credible sovereigns in our concurrent powers system.

> There is one transcendent advantage belonging to the province of the State governments, . . . I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.

The Federalist Papers, No. XVII. For the federal sovereign to appropriate this power in a haphazard fashion would upset this "most attractive source of popular obedience." This elementary mandate of separate sovereignty in our constitutional system is fully ignored in the argument presented by Petitioner to this Court.

Amicus does not dispute the power of the federal courts to prosecute this crime separately. *See Abbate v. United States*,

359 U.S. 187 (1959).[16] What *Amicus* does dispute is the Petitioner's unsupported assumption that Congress has mandated consecutive Federal punishments predicated on State punishments for same-transaction crimes.

B. New Mexico's Interest in Fashioning an Appropriate Sentence would be Marginalized by a Federally Mandated Consecutive Sentence.

The single most important *fact* in this case is that the criminal transaction for which the Respondent and others were prosecuted was State planned, State initiated, and State executed. The officers involved were State officers and, when their reverse sting turned sour, it was State officers posing as drug dealers who were victimized. No federal agency was involved in the planning of the reverse sting and no federal agent was at risk during the implementation of the plan. Further, the State expressed its primary interest in the criminal transaction by prosecuting and sentencing those involved, including adding an enhancement for the use of a weapon during the criminal activity. Moreover, no federal agent was an important witness at the later federal trial.

The Petitioner, in its brief, assiduously avoids mention of the State's interest in the sentence that should be imposed in this case. As indicated above, each of the Respondents was first tried, convicted and sentenced in State court for their crimes against the State of New Mexico. New Mexico vests the authority to impose concurrent sentences in the trial eourt.

In the situation presented to this Court, New Mexico, at the time of sentencing, had before it no other sentence to consider. This, however, does not mean that the sentencing

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[16] Contrary to the Petitioner's assertion that *Abbate* stands for the proposition that the Federal Government may "punish the offender cumulatively," Pet. Brief at 14, the case in fact stands only for the well settled principle that the Federal Government may *prosecute* cumulatively. *Abbate*, 359 U.S. at 196; *see also Bartkus v. Illinois*, 359 U.S. 121 (1959) (successive State prosecution after federal prosecution does not violate the Constitution).

interest and authority was therefore abandoned to the Federal Government if it chose to prosecute same-transaction offenses. In such situations, where no preference is stated by the sentencing judge, New Mexico common law has long mandated that when there are two or more sentences based on separate convictions – regardless of whether they are for same transaction offenses – the sentences are to be run concurrently. *See Swope v. Cooksie,* 285 P.2d 793 (N.M. 1955).[17]

This specific determination of a concurrent sovereign regarding the appropriate sentence for a given transaction should not be allowed to be easily upset by Congress. And, it is not just the law of New Mexico which would be so overwritten. The law of each of the fifty states either mandates concurrence in same-transaction sentencing,[18] defaults concurrence in same-transaction sentencing[19] or, at a minimum, allows the State trial court the discretion to require concurrent sentences in same-transaction sentencing.[20] There therefore

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[17] *See also State v. Maybury,* 643 P.2d 629, 632 (N.M.App. 1982): "The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be run concurrently." (Citations omitted).

[18] *See* South Dakota Codified Laws 22-6-6.1 (1996); *State v. Red Kettle*, 452 N.W.2d 774 (S.D. 1990) (State court has no authority to order state sentence to run consecutively to same-transaction federal sentence).

[19] *See* Ark. Code Ann. § 5-4-403(b) (Michie 1995); Cal. Penal Code § 669 (West 1996); Fla. Stat. Ann. § 921.16(1)(2) (West 1995); Ga. Code Ann. § 17-10-10(b) (Harrsion 1996); 730 Ill. Comp. Stat. 5/5-8-4(West 1996); Me. Rev. Stat. Ann. tit. 17A, § 1256(2) (West 1995); Minn. Stat. § 609.15 (1995); Mo. Rev. Stat. § 558.026(3) (1995); Sup. Ct. R. 2909, Rev. Stat. Mo. (1996); N.Y. Penal Law § 70.25(2) (McKinney 1996); N.D. Crim Code 12.1-32-11 (1995); Ohio Rev. Code Ann. § 2929.41 (Baldwin 1996); Or. Rev. Stat. § 137.370 (1995); Pa. Stat. Ann. tit. 42, § 9721 (West 1995), 204 Pa. Code § 303.7(a) (1995) (Sentencing guidelines for current multiple convictions); Vt. Stat. Ann. tit. 13, § 7032 (1995) (implied, *See, In re Hough*, 458 A.2d 1134 (1983); Wash. Rev. Code Ann. § 9.94A.400 (West 1996).

[20] *See*, Ala. Rules Crim. Pro., Rule 26.12 (1996); Colo. Rev. Stat. § 18-1-408(3) (1995); Conn. Gen. Stat. § 539-37 (1994); Del. Code Ann.

exists a near-universal determination that same-transaction concurrence in sentencing is an essential interest of the sentencing authority.[21]

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tit. 11, § 1447 (1995); Haw. Rev. Stat. § 706-668.5(1) (Michie 1995); Idaho Code § 18-308 (1996); Ind. Code § 35-50-1-2(c) (1996); Iowa Code § 901.5 (1995); Kan. Stat. Ann. § 21-4608(h) (1995); Ky. Rev. Stat. Ann. § 532.110(1) (Banks-Baldwin 1995); La. Code Crim. Proc. Ann. art. 883 (West 1996); Md. Code 1957, Art. 27, § 486 (1995); Mass. Gen. Laws Ann. ch. 279 § 8 (West 1996); M.C.L.A. 768.7b; Miss. Code Ann. § 99-19-21(1) (1995); Mont. Code Ann. § 46-18-401 (1995) (*construed in State v. Miller,* 757 P.2d 1275 (Mont. 1988)); Mo. Ann. Stat. § 558.026 (Vernon 1995); Neb. Rev. Stat. § 29-2204 (1995); *State v. Zaritz*, 235 Neb. 599 (Neb., 1990); N.J. Stat. Ann. § 2C: 44-5(D) (West 1995); N.C. Gen. Stat. § 15-196.2 (1995) (*implied)*; Okla. Stat. tit. 21 § 61.1 (1995); Okla. Stat. tit. 22 § 976 (1995); R.I. Code R., Super. Ct. Sent. Benchmark 7 (1994); S.C. Code Ann. § 44-53-370 (1976); Tex. Code Ann. § 40-20-111(a) (1996); Tex. Code Crim. Proc. Ann. art. 42.08 (West 1995); Utah Code § 76-3-401 (1996); Va. Code Ann. § 19.2-308 (1996); W. Va. Code § 61-11-21 (1995); Wis. Stat § 973.15 (1996); W. R. Cr. P., Rule 35 (1995).

A small minority of States seem to presume consecutive sentencing, but allow state court discretion to run same-transaction crimes concurrently. *See* Alaska Stat. § 12.55.025 (1995); Ariz. Rules Crim Pro., Rule 26.13 (West 1996); D.C. Code Ann. § 23-112 (1996); Nev. Rev. Stat. § 176.045 (1995).

[21] The American Bar Association's Standards for Criminal Justice Sentencing, third ed., likewise support the principle of same-transaction (or single episode) sentencing concurrence in Standard 18-6.5, which reads:

In sentencing an offender for offenses that were part of an episode;

(i) a sentencing court should not increase the severity of the sentence or change the type of sanction merely as a result of the number of counts or charges made from a single episode, and

(ii) where the separate offenses are not merged for sentencing, a sentencing court should consider imposition of sanctions of a type and level of severity that take into account the connections between the separate offenses and, in imposing sanctions of total confinement, ordinarily should designate them to be served consecutively.

See also Standard 18-3.8(b) ("A sentencing court should be authorized to impose a sanction of total confinement to run concurrently with an out-of-

C. Due Process and Fundamental Fairness Prevent the Federal Sovereign from Consecutive Punishments for Conduct already Punished by the State.

Although this Court has often visited the issue whether each sovereign may successively *prosecute* for same-transaction offenses, it has never addressed the issue whether each sovereign may *consecutively punish* for same-transaction offenses. *Amicus* urges this Court to use this occasion to finally hold that the federal sovereign may not order a same-transaction punishment to run consecutively to that ordered by a State. This result is dictated by precedent and fairness, and should be held to be a part of due process required by both the Fifth and Fourteenth Amendments to the United States Constitution.

The history of this Court's concern with the due process and fundamental fairness implications of cross-sovereign punishment is longstanding indeed. In *Fox v. Ohio*, 5 How. 410, 435 (1847), this Court stated:

> It is almost certain, that, in the benignant spirit in which the institutions both of the state and federal systems are administered, *an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same*, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

(Emphasis added). See also Rinaldi v. United States, 434 U.S. 22, 27-28 (1977) (*quoting Fox*); *United States v. Lanza*, 260 U.S. 377, 383 (1922) (same).

This distinction between the constitutionality of successive prosecutions and the constitutionality of consecutive punishments is critical to the instant case. The reason for a different holding regarding prosecutions and punishments is described in *Abbate*, namely, that each sovereign should be able to independently determine and impose the sentence that

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state sentence, even though the time will be served in an out-of-state institution.").

each believes appropriate. In *Abbate*, the Court was faced with an ideal example of this principle:

> For example, the petitioners in this case insist that their Illinois convictions resulting in three months' prison sentences should bar this federal prosecution which could result in a sentence of up to five years. Such a disparity will very often arise when, as in this case, the defendants acts impinge more seriously on a federal interest than on a State interest.

Id. at 195. Therefore, the basis of the Court's ruling has been that "if the Double Jeopardy Clause were applied when the sovereign with the greater interest is not the first to proceed, the administration of criminal justice may suffer." *Rinaldi*, 434 U.S. at 28.

In light of the very real eventuality of different sovereign interests, be it in favor of the State or the federal government, this Court has not barred successive cross-sovereign prosecutions for same-transaction offenses. Nothing in this analysis, however, suggests that either sovereign has an interest in consecutive sentences for those offenses. To suggest otherwise, as Petitioner does without any analysis, extends the limited idea of concurrent sovereignty to mean that each sovereign is entitled, independently, to its own distinct punishment. Nothing in history, law, or practice supports this idea.

Incarceration as punishment is no different if that term is served in State prison in Los Lunas, New Mexico, or the federal penitentiary in Leavenworth, Kansas. As detailed above, the fifty States have recognized the appropriateness of same-transaction concurrent sentencing. The federal government has, through legislation, recognized the propriety of same-transaction concurrence in sentencing. Further, the Petitioner has previously recognized that the interests in concurrence of sentences in same-transaction crimes – or indeed of no successive prosecution at all – may be mandated by the problems of unfairness inherent in the dual sovereignty system of successive prosecutions. In 1960, only a year after its reconsideration of the limitations on dual sovereignty in *Abbate*

and *Bartkus*,[22] this Court recognized the Attorney General's right to dismiss an indictment in federal court to avoid any perceived unfairness of sentences. *Petite v. United States*, 361 U.S. 529 (1960) (*per curiam*). In light of the Solicitor General's motion to vacate the indictment below, this Court was left with no controversy to resolve. *Id.* However, the Solicitor General declared that dismissing a federal indictment arising from the same event which had already been prosecuted and punished in State court, was an action "dictated by considerations both of fairness to the defendants and to efficient and orderly law enforcement." *Id.* at 530.

This policy of exercising federal executive discretion to forego prosecution of one already convicted in a State prosecution of same-transaction crimes, is now an Executive policy referred to as the *Petite* policy for the name of the case in which it was first discussed. *See* Department of Justice Manual 9-2.142.[23] Because this policy of restraint is not presently constitutionally commanded, the application of the policy still rests with the federal executive. However, this Court has recognized that the interests implicated by such cross-sovereign

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[22] This Court has specifically noted that the *Petite* policy "was formulated by the Justice Department in direct response to this Court's opinions in *Bartkus* . . . and *Abbate*. . . ." *Rinaldi v. United States*, 434 U.S. 26, 18 (1977). In fact, the Attorney General's announcement of the policy on April 6, 1959, came only one week after *Bartkus* and *Abbate* were decided and two months before rehearing was denied in *Bartkus*. (No rehearing was sought in *Abbate*).

[23] One of the stated purposes of the Executive's *Petite* policy of foregoing successive prosecutions to State prosecutions and convictions is:

> to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s).

Department of Justice Manual 9-2.142(I)(B). The procedure for implementing this policy is designed to ensure the actual exercise of discretion by high level prosecuting officials by requiring prior approval for prosecution. *Id.* at (V)(B.) If such prior approval is not obtained, the United States is to dismiss the charges unless the Assistant Attorney General retroactively approves the prosecution. *Id.*, at (V)(C.)

prosecutions are significant enough to allow defendants caught between two same-transaction prosecutions to claim a violation of the policy in federal court. *See Rinaldi v. United States*, 434 U.S. 22 (1977).[24] In its *per curiam* opinion in *Rinaldi*, this Court noted that the *Petite* policy was the Executive's response to the concerns of the Court regarding the legitimacy of successive state and federal prosecutions for the same-transaction. This Court noted that "this Executive policy serves to protect interests which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the double jeopardy clause." *Id.* at 29.

The *Petite* policy is essentially a concurrent sentencing policy with two separate components. If the Executive is satisfied that the punishment received in the State court is sufficient to vindicate the separate interests of the federal sovereign, it will forego further proceedings for both prosecution and punishment reasons. As to the independent *prosecution* aspect of the *Petite* policy, the rule is merely the expression of a determination of available resources for the Executive. As to the independent *punishment* feature of the policy, concurrent sentencing is mandated by due process concepts of fundamental fairness. In circumstances like the instant case, the independent federal sovereign's interest in absolute punishment is completely satisfied by the State of New Mexico's same-transaction sentences and, therefore, regardless of the Executive's resource determinations regarding prosecution, cross-sovereign consecutive punishment is fundamentally unfair.

Therefore, to insure the appropriate use of the *Petite* policy, it should be mandated under the Fourteenth Amendment due process clause that, in same-transaction, dual sovereign criminal prosecutions, neither sovereign power has an interest in consecutive sentencing. The only constitutionally acceptable expression of a sovereign's interest in punishment for a crime is in the absolute sentence imposed – without regard to another sovereign's similar or disparate pronouncements.

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[24] An argument that the *Petite* policy should be implemented was raised below in the District Court. *See* Joint Appendix at 36-37.

CONCLUSION

Thorough analysis of the question raised in this case requires a holding that § 924(c) does not mandate, or even allow, consecutive sentencing for a defendant who is subject to imprisonment under state sentence based upon the same transaction leading to the conviction for a violation of § 924(c). This holding is supported by the plain meaning of the statute, within the context of federal criminal law. In addition, the legistative history of the Act confirms this reading. Such a holding is also required by the Constitutional limits of the dual sovereignty doctrine and the Due Process Clause of the Fifth Amendment to the Constitution. The results so demanded by this analysis protect both state and federal interests in punishment for criminal activity.

Respectfully submitted,

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APPENDIX

SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO

STATE OF NEW MEXICO

No. CRCR 91-0770
DA#: 91-1093-01

STATE OF NEW MEXICO
Plaintiff,

vs.

MIGUEL GONZALES,
DOB: 2-18-61
SSN: 589-38-9962
ADD: BCDC

Defendant.

JUDGMENT, PARTIALLY SUSPENDED SENTENCE AND COMMITMENT

(Filed March 24, 1992)

On March 10, 1992, this case came before the Honorable W. C. Woody Smith, District Judge, for sentencing, the State appearing by Neil Candelaria, Deputy District Attorney, the Defendant appearing personally and by his attorney Lauro Silva, and the Defendant having been convicted on February 11, 1992, pursuant to a jury verdict of guilty, accepted and recorded by the Court, of the offenses of: Armed Robbery (Firearm Enhancement), a felony offense occurring on or about April 23, 1991, as contained in Count 2 of the Indictment; Attempt to Commit a Felony, to wit: Armed Robbery of Marijuana (Firearm Enhancement), a felony offense occurring on or about April 23, 1991, as contained in Count 3 of the

Indictment; Conspiracy to Commit Armed Robbery (Firearm Enhancement), a felony offense occurring on or about April 23, 1991, as contained in Count 4 of the Indictment and Conspiracy to Commit Possession of Marijuana (eight ounces or more) a felony offense occurring on or about April 23, 1991, as contained in Count 6 of the Indictment as amended at trial.

The Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of: nine (9) years as to Armed Robbery; three (3) years as to Attempt to Commit a Felony to wit: Armed Robbery of Marijuana; three (3) years as to Conspiracy to Commit Armed Robbery, and one and one half (1½) years as to Conspiracy to Commit Possession of Marijuana (eight ounces or more). All sentences are to run *consecutive* to one another. In addition, all the offenses, excluding Conspiracy to Commit Possession of Marijuana (Count 6) are *each* enhanced by 1 year pursuant to Section 31-18-16 NMSA, 1978, for a total sentence of nineteen and one half (19½) years. Six and one half (6½) years is suspended, for an actual sentence of imprisonment of thirteen (13) years.

Execution of six and one half (6½) of the sentence is suspended and Defendant is ordered to be placed on supervised probation for five (5) years following release from custody, on condition that Defendant obey all rules, regulations and orders of the Probation Authorities, and observe all federal, state and city laws or ordinances.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the

above-named Defendant in custody and confine him for the above term.

Defendant is to receive credit for 322 days pre-sentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS FURTHER ORDERED that Defendant be placed on parole for 2 years after release, and be required to pay parole costs.

/s/ W.C. Woody Smith
DISTRICT JUDGE

APPROVED:

/s/ Illegible
Deputy District Attorney

/s/ Illegible
Attorney for Defendant

SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO

STATE OF NEW MEXICO

No. CR-CR-91-0776
DA#: 91-1093-03

STATE OF NEW MEXICO

Plaintiff,

vs.

MARIO PEREZ,
DOB: 3-21-65
SSN: 597-44-9801
ADD: BCDC

Defendant.

FIRST AMENDED
JUDGMENT, PARTIALLY SUSPENDED SENTENCE
AND COMMITMENT

(Filed April 23, 1992)

On March 10, 1992, this case came before the Honorable W. C. "Woody" Smith, District Judge, for reconsideration of sentence filed by the Defendant. The State appeared by Neil Candelaria, Deputy District Attorney, the Defendant appeared personally and by his attorney Becky S. Jiron. The Court having reconsidered its sentence entered in the above matter on March 24, 1992, for the following offenses: Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 1 of the Indictment; Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 2 of the Indictment; Armed Robbery of Marijuana

(Firearm Enhancement) as contained in Count 3 of the Indictment; Conspiracy to Commit Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 4 of the Indictment; False Imprisonment (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 5 of the Indictment; Conspiracy to Commit Possession of Marijuana (eight ounces or more) a felony offense occurring on or about April 23, 1991, as contained in Count 6 of the Indictment as amended in trial, and Eluding an Officer, a misdemeanor offense occurring on or about April 23, 1991, as contained in Count 7 of the Indictment as amended at trial.

The Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of nine (9) years as to *each* Armed Robbery; three (3) years as to Attempt to Commit a Felony to wit: Armed Robbery of Marijuana; three (3) years as to Conspiracy to Commit Armed Robbery; one and one-half (1½) years as to Conspiracy to Commit Possession of Marijuana) one and one-half (1½) years as to False Imprisonment;, and three-hundred sixty-four (364) days as to Eluding an Officer. All sentences are to run *consecutive* to one another. In addition, all the offenses, excluding Conspiracy to Commit Possession of Marijuana and Eluding an Officer, are *each* enhanced by 1 year pursuant to Section 31-18-16 NMSA, 1978 for a total sentence of thirty-two (32) years and three hundred and sixty-four days of which fifteen (15) years and three hundred and sixty-four days are suspended for an actual sentence of 17 years. Defendant is ordered to be placed on supervised

probation for five (5) years following release from custody, on condition that Defendant obey all rules, regulations and orders of the Probation Authorities, and observe all federal, state and city laws or ordinances.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the above-named Defendant in custody and confine him for the above term.

Defendant is to receive credit for 314 days pre-sentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS THEREFORE ORDERED that Defendant be placed on parole for 2 years after release, and be required to pay parole costs.

/s/ W.C. Woody Smith
DISTRICT JUDGE

APPROVED:

/s/ Illegible
Deputy District Attorney

/s/ Becky S. Jiron
Attorney for Defendant

SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO

STATE OF NEW MEXICO

No. CRCR 91-0772
DA#: 91-1093-03

STATE OF NEW MEXICO

Plaintiff,

vs.

ORLENIS HERNANDEZ-DIAZ,
DOB: 12-16-65
SSN: 592-96-8181
ADD: BCDC

Defendant.

FIRST AMENDED JUDGMENT, PARTIALLY SUSPENDED SENTENCE AND COMMITMENT

(Filed Apr. 23, 1992)

On March 10, 1992, this case came before the Honorable W. C. "Woddy" Smith, District Judge, for reconsideration of sentence filed by the Defendant. The State appeared by Neil Candelaria, Deputy District Attorney, the Defendant appeared personally and by his attorney Phillip Medrano. The Court having reconsidered its sentence entered in the above matter on March 24, 1992, for the following offenses: Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 1 of the Indictment; Attempt to Commit a Felony to wit: Armed Robbery of Marijuana (Firearm Enhancement), a felony offense occurring on or about April 23, 1991, as contained in

Count 3 of the Indictment; Conspiracy to Commit Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 4 of the Indictment; False Imprisonment (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 5 of the Indictment, and Conspiracy to Commit Possession of Marijuana (eight ounces or more) a felony offense occurring on or about April 23, 1991, as contained in Count 6 of the Indictment as amended at trial.

The Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of: nine (9) years as to Armed Robbery; three (3) years as to Attempt to Commit a Felony to wit: Armed Robbery of Marijuana; three (3) years as to Conspiracy to Commit Armed Robbery; one and one half (1½) years as to Conspiracy to Commit Possession of Marijuana (eight ounces or more). All sentences are to run *consecutive* to one another. In addition, all the offenses, excluding Conspiracy to Commit Possession of Marijuana (Count 6) are *each* enhanced by 1 year pursuant to Section 31-18-16 NMSA, 1978, for a total sentence of twenty-two (22) years, of which seven and one-half (7½) years is suspended, for an actual sentence of imprisonment of fourteen and one-half (14½) years.

Execution of seven and one-half (7½) years of the sentence is suspended and Defendant is ordered to be placed on supervised probation for five (5) years following release from custody, on condition that Defendant obey all rules, regulations and orders of the Probation

Authorities, and observe all federal, state, and city laws or ordinances.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the above-named Defendant in custody and confine him for the above term.

Defendant is to receive credit for 322 days pre-sentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS FURTHER ORDERED that Defendant be placed on parole for 2 years after release, and be required to pay parole costs.

W.C. WOODY SMITH
DISTRICT JUDGE

APPROVED:

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Deputy District Attorney

/s/ Phillip Medrano
Attorney for Defendant